80-1348

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No. ----------

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

STATE OF FLORIDA
DEPARTMENT OF STATE,

Petitioner,

-vs-

TREASURE SALVORS, INC.,
ARMADA RESEARCH CORP.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

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QUESTION PRESENTED

I. Whether the Eleventh Amendment to the United States Constitution bars an in rem admiralty action seeking to recover property owned by a state.

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No. ----------

IN THE

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October Term, 1980

STATE OF FLORIDA

DEPARTMENT OF STATE,

Petitioner,

-vs-

TREASURE SALVORS, INC.,

ARMADA RESEARCH CORP.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OPINIONS BELOW

The following opinions of the lower courts are included in the Appendix to the Petition:

1. Opinion of the United States Court of Appeals for the Fifth Circuit, rendered July 24, 1980, in this action.

2. Opinion of the United States District Court for the Southern District of Florida, rendered August 21, 1978, in this action.

JURISDICTION

The opinion of the Court of Appeals was entered on July 24, 1980. Rehearing en banc was denied on October 16, 1980, and the mandate issued on October 24, 1980. Jurisdiction to review the judgment of the Court of Appeals is conferred on this Court by 28 U.S.C., Section 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution, Article III, Section 2

> The judicial power shall extend . . ., --to all cases of admiralty and maritime jurisdiction; . . . (set out in full in the appendix hereto).

U.S. Constitution, Amendment 11

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

Florida Statutes, Chapter 267 (1979)

> (set out in full in the appendix hereto).

STATEMENT OF THE CASE

This case has its origin in an action brought pursuant to Article III, Section 2 of the U.S. Constitution (App. A164-165), conferring admiralty jurisdiction solely in the federal courts. The State of Florida was not a party to

this first action, Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 569 F.2d 330 (5th Cir. 1978) (hereinafter Treasure Salvors I) wherein it was held that the remains of a vessel lying on that part of the continental shelf outside the territorial waters of the United States were therefore not situated on lands owned or controlled by the United States under the provisions of the Antiquities Act. This established title to the vessel and its cargo in the Respondent as against the United States only.

The instant case arose through ancillary process issued by the district court pursuant to the Court of Appeals' decision in Treasure Salvors I. The district court issued a warrant for

arrest in rem, directing the marshal to take possession of all artifacts from the vessel in the custody or control of the State of Florida's Division of Archives office in Tallahassee. On August 21, 1978, the district court entered final judgment in behalf of the Respondent. In a Memorandum Order reported at 459 F.Supp. 507 (S.D. Fla. 1978) (App. A61-163), the court found the Eleventh Amendment inapplicable to a suit to determine title to artifacts, and directed the State of Florida to relinquish possession of the artifacts to the district court.

The Court of Appeals affirmed the decision of the district court as to jurisdiction over the State on July 24, 1980 (Rubin, J. dissenting). In re State of Florida Department of State v.

Treasure Salvors, Inc., 621 F.2d 1340 (5th Cir. 1980) (hereinafter Treasure Salvors II) (App. A6-60). Florida's petition for rehearing en banc was denied October 16, 1980, and the mandate issued on October 24, 1980 (App. A1-5).

The importance of this petition for writ of certiorari to Court of Appeals is monumental, for the issue of subjecting a state to such suits and requiring it to relinquish property under the guise of an admiralty action in rem has far-reaching ramifications not only in the circumstances of this action, but in any case wherein a state seeks to retain title and possession of its archaeological and historical resources.

ARGUMENT

This Court should grant its Writ of Certiorari to review the decision of the Court of Appeals because the Court has in effect decided that if there is a controverted claim of state ownership of property, the controversy becomes an appropriate subject for admiralty jurisdiction and the district court may hear the case.

The State of Florida contends that it has title to the property within the jurisdiction of the court pursuant to contracts in which Treasure Salvors agreed to relinquish twenty-five percent of the items recovered from a sunken Spanish galleon in return for the right to salvage on state sovereignty submerged lands; therefore the Eleventh Amendment

deprived the district court of jurisdiction to adjudicate the State's title or lack of it. The Court of Appeals affirmed the District Court's ruling that the Eleventh Amendment did not preclude an action to recover the artifacts in the possession of the State, and ordered it to turn over all such items to Treasure Salvors.

This action has been styled as an in rem proceeding in admiralty; however, the thrust of the Respondent's claim is simply to bring suit to recover property from the State of Florida. As pointed out in the dissenting opinion of Judge Rubin, the Eleventh Amendment is equally applicable to admiralty actions, and neither of the companion cases relied upon by the panel majority, In re New

York, 256 U.S. 490, 41 S.Ct. 588, 65 L.Ed. 1057 (1921) and 256 U.S. 503, 41 S.Ct. 592, 65 L.Ed. 1063 (1921) holds that a state may be involuntarily divested of title to property in its possession. Instead, the Supreme Court in those cases held that the State's suggestion of ownership, in the absence of a special challenge, triggered the application of the Eleventh Amendment and thus the district court's jurisdiction came to an end. However, Judge Rubin, in his dissent below, stated:

> . . . I do not understand this to imply that, if there is a controverted claim of state ownership, the controversy becomes an appropriate subject for admiralty jurisdiction. Such a conclusion is particularly difficult to reconcile with the Eleventh Amendment when, as here,

> the determination of ownership involves the adjudication of an underlying contract dispute between a citizen of a state and the state itself, a purely local question.

Treasure Salvors II, at 1350-51 (App. A53-54).

Indeed, the panel majority of the Court of Appeals simply holds that an in rem admiralty action may be brought to recover property from a state, but fails to distinguish its prior decisions which directly hold that a state may invoke its Eleventh Amendment defense in admiralty actions. Intracoastal Transportation, Inc. v. Decatur County, Georgia, 482 F.2d 361 (5th Cir. 1973); Platero Ltd., Inc. v. Unidentified Remains of a Vessel, 508 F.2d 1113 (5th Cir. 1975). See also Red Star Towing and Transportation Co. v. Connecticut, 431 F.Supp. 1003

(D. Conn. 1976). Thus, the ultimate result of this decision is that a citizen in a contract dispute with a state may recover property from the state so long as there is some implied admiralty issue.

The application of the Eleventh Amendment to admiralty actions against states for the recovery of property is of special significance not only to the State of Florida in this petition, but to all states which have extensive historical coastal interests. See, i.e., Platero Ltd., Inc. v. Unidentified Remains of a Vessel, supra. If the Court of Appeals is allowed to recede from its previous construction of the Eleventh Amendment's application to suits in admiralty, then the historical

preservation efforts of all coastal states are jeopardized. See Chapter 267, Fla. Stat. (1979) (App. A166-219).

CONCLUSION

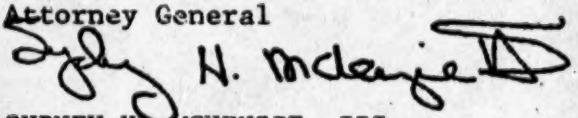
The question of bringing a state into federal court to test its title to property far transcends the artifacts which are involved in this case, and goes to the fundamental constitutional protections afforded the states. As pointed out in Judge Rubin's dissent, the decision of the Court of Appeals summarily disposes of this issue without distinguishing prior holdings, and the resulting confusion wrought by the Court's decision merits the granting of certiorari.

For the foregoing reasons, Petitioner respectfully urges this Court

to grant certiorari to review the decision of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

JIM SMITH
Attorney General



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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-2950

IN RE: STATE OF FLORIDA,
DEPARTMENT OF STATE,
Petitioner-Appellant,

versus

TREASURE SALVORS, INC.,
a corporation and ARMADA
RESEARCH CORP., a corporation,
Plaintiffs-Appellees,

THE UNIDENTIFIED WRECKED AND
ABANDONED SAILING VESSEL, ETC.,
Defendant.

- - - - -

Appeal from the United States
District Court for the
Southern District of Florida

- - - - -

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion July 24, 1980, 5 Cir., 198_, _____F.2d ____).

(OCTOBER 16, 1980)

Before GEWIN, RUBIN and SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

( ) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is also DENIED.

(XX) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

s/ Sam D. Johnson
United States Circuit Judge

Form 704-2

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-2950

D. C. Docket No. 75-1416-Civ-WM

IN RE: STATE OF FLORIDA, DEPARTMENT OF STATE,

Petitioner-Appellant,

versus

TREASURE SALVORS, INC., a Corporation, AND ARMADA RESEARCH CORP., a Corporation,

Plaintiffs-Appellees,

THE UNIDENTIFIED WRECKED and ABANDONED SAILING VESSEL, Etc.,

Defendant.

Appeals from the United States District Court for the Southern District of Florida

Before GEWIN, RUBIN AND SAM D. JOHNSON, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the

United States District Court for the the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that petitioner-appellant pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

July 24, 1980

ALVIN B. RUBIN, Circuit Judge, dissenting:

Issued as Mandate: OCT 24 1980

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 78-2950

IN RE: STATE OF FLORIDA
DEPARTMENT OF STATE,

Petitioner/Appellant,

VERSUS

TREASURE SALVORS, INC., etc.,

Plaintiffs/Appellees,

THE UNIDENTIFIED, WRECKED AND
ABANDONED SAILING VESSEL, ETC.,

Defendant.

Appeal From the United States
District Court For the Southern
District of Florida

(July 24, 1980)

Before GEWIN, RUBIN and SAM D. JOHNSON, Circuit Judges.

SAM D. JOHNSON, Circuit Judge:

This appeal offers this Court its second opportunity to determine ownership rights in artifacts recovered from the Spanish vessel, Atocha. In this Court's first opinion, Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, 569 F.2d 330 (5th Cir. 1978) (hereinafter Treasure Salvors I), it was held that Treasure Salvors and Armada Research Corp.[1] had title to the vessel and its cargo as against the United States. In the instant case this Court affirms the district court's holding that these two Florida corporations have

[1] These two corporations will be referred to as Treasure Salvors in this opinion.

title to various artifacts as against the State of Florida.[2]

Facts

The historical backdrop for this case was detailed in Treasure Salvors I, 569 F.2d at 333, and was the subject of a National Geographic article, Lyon, The Trouble with Treasure, 149 National Geographic 787 (June 1976), but is well worth repeating. This case dates back to the early 17th Century, when Spain was

[2]In November 1975, plaintiffs issued and published a monition against all potential claimants of the vessel and its cargo, admonishing them to file their claims to the vessel. Only two parties did so--the United States and Florida. On April 4, 1978, this Court issued a mandate affirming the district court's judgment in Treasure Salvors I, as modified, against the United States. On May 3, 1978, the district court issued a default judgment against all potential claimants who had not filed their claims and barred and precluded filing any further claims to the vessel.

using the riches of the New World to finance her European military adventures. On September 4, 1622, a fleet of 28 ships, known as the Tierra Firme Flota,, commanded by the Marquis of Cadereita, set sail from Havana for Cadiz laden with bullion, spices, and tobacco for King Phillip IV. As the ships entered the Florida Straits in search of the favorable Gulf Stream currents, bad weather set in, and the vessels soon found themselves in the midst of a hurricane. The destructive winds from the northeast stripped the vessels of their masts, sails, and standing rigging. The winds then shifted to the south and eight of the ships were driven toward the dangerous waters of the lower Florida Keys, where they were soon lost. The remaining vessels limped back to Havana. One of

the eight ships that went down was the Nuestra Senora de Atocha. When the Atocha set sail from Havana, she was carrying in excess of one million pesos of registered bullion and specie. Her hold contained a treasure worth of Midas: 160 gold bullion pieces, 900 silver ingots, over 250,000 silver coins, 600 copper planks, 350 chests of indigo and 25 tons of tobacco.[3]

The Spaniards began a salvage effort as soon as the news of the disaster reached Havana. Under the direction of Captain Gasper de Vargas, the salvors located the Atocha intact in 55 feet of water, with her mast peering above the surface. The divers, however, were

[3]In 1978, this cargo was valued at $250 million. Today's meteoric rise in the price of precious metals has undoubtedly substantially increased the present value of the Spaniards' booty.

unable to enter the holds containing the treasure, as they were all battened down. Only two bronze cannons from the upper deck of the stern castle could be retrieved.

De Vargas opted to place surface buoys to mark the position of the Atocha and sail west to salvage the Rosario, another of the eight vessels that sank in the hurricane. In early October, another hurricane ravaged the Lower Keys, breaking up the hull of the Atocha and spreading her treasure beneath the sands. When Vargas returned, he found the storm had removed the protruding mast and his surface buoys. He was unable to relocate the vessel.

Early in 1623, the Marquis of Cadereita sailed from Havana to

personally supervise the search.[4] The continued efforts proved fruitless. Finally, in late 1623, the Spaniards abandoned the search.

The Cuban authorities, however, did not give up hope. They continued to keep the general area buoyed in anticipation of future salvage efforts.[5] In 1626, Francisco Nunez Melian began searching for the Atocha and Santa Margarita under a Royal salvage contract. Using state of the art equipment, including a 600 pound bronze diving bell with windows, Melian was able to find the Santa Margarita and,

[4]The Marquis directed the salvage operation from his camp on one of the nearby keys. These keys were named "Cayos de Marques" after the Marquis and today are known as the Marquesas Keys.

[5]In 1625 another vessel was lost and all the crew members perished in this continuing effort to mark the location of the treasure-laden vessels.

over four years, salvage her cargo. Dutch raiding parties, hostile Indians,[6] and political opportunities[7] eventually brought the search for the Atocha to a close in 1641. Finally, in 1683, the Spanish House of Trade published a list of ships still missing. The Atocha headed the list. Melian's salvage accounts were sent from Havana to the Archive of the Indies in Seville, and the Atocha passed into history.

Over three centuries later, in the mid-1960's, treasure searchers renewed their efforts to locate the Atocha and her rich treasure. By 1968, the search

[6]The Indians burned a salvage vessel that floundered just off the Marquesas Keys and, eventually, the Spanish salvage camp.

[7]Melian was appointed Governor at Caracas. Captain Juan de Anvez continued the salvage of the Santa Margarita, but only occasionally searched for the Atocha.

was concentrated in the Middle Keys, near Upper Matecumbe Key. This area was isolated by the searchers after pouring through the Spanish archival records in Seville.[8] Years of searching yielded nothing.

Finally, in the late 1960's, Dr. Eugene Lyon, working as a consulting historian for Treasure Salvors, uncovered documentary evidence which indicated to him that the current salvage efforts were directed at the wrong set of keys. He discovered that "Matecumbe" was a general term used to denote the Florida Keys, as a whole. A thorough search of Melian's

[8]Documents drafted at the same time as the Atocha went down indicated that the vessel sank near "Matecumbe." Searchers concentrated their efforts in the Middle Keys, hoping that the "Matecumbe" referred to in the original documents corresponded to the modern key bearing that name.

salvage records revealed that the search for the Atocha had centered near "Cayos del Marques." This placed the wreck of the Atocha somewhere between the Dry Tortugas and Sand Key in the Lower Keys.

Once Dr. Lyon ascertained what he believed to be the correct general area of the Atocha's watery grave, "all" that remained for Treasure Salvors was to pinpoint the exact location. It was a task easier said than done. For one year they searched some 120,000 nautical miles of seabed 24 hours a day before detecting a large galleon-size anchor in the spring of 1971. Additional shipwreck material was recovered in the immediate vicinity of the anchor. Soon the wreck was

identified as part of the break-up of the Atocha.[9]

In April 1971, Treasure Salvors and the State of Florida executed a one year contract allowing Salvors to conduct their underwater salvage operations on the Atocha. Both parties entered into this agreement under the belief that the Atocha was resting on land owned by Florida. Eventually, four contracts were signed (the last in November 1974) each running about one year. Under the contracts, the State was entitled to 25% of the finds. In June 1973, Florida's

[9]The wreck site is located near some shoals known as the "Quicksands," nine and one half nautical miles west of the Marquesas Keys and forty nautical miles west of Key West. Those mariners familiar with this area will recognize it as being in the heart of a Naval Operational Training Area and only three nautical miles west of a Bombing and Strafing Target Area.

Division of Archives in Tallahassee received its share[10] of the first batch of artifacts recovered by Treasure Salvors. In February 1975, the Salvors delivered what turned out to be the State's last batch.

The Atocha's legal odyssey began with the Supreme Court's decision in United States v. Florida, 420 U.S. 531, 95 S.Ct. 1162, 43 L.Ed.2d 375 (1975). The Court affirmed the report of Special Master Maris, rejecting Florida's ownership claim of submerged lands, including that part of the continental shelf on which the Atocha rests. The report established that Florida had never owned

[10]Treasure Salvors kept many of the artifacts recovered at their corporate headquarters, a 168 foot reconstructed galleon anchored at the foot of Margaret Street in Key West, Florida. The precious stones were kept in a safety deposit box in Key West.

an interest in any of the lands involved in the case at bar. On July 18, 1975, four months after the Supreme Court's holding, Treasure Salvors filed an in rem action in the Southern District of Florida for possession or confirmation of title to the abandoned vessel believed to be the Nuestra Senora de Atocha.

The United States intervened in the action and asserted title to the vessel. The district court entered judgment for Treasure Salvors and this court affirmed the trial judge's ruling that as between Treasure Salvors and the United States, Treasure Salvors had title to and right to possession of the vessel and its cargo. Treasure Salvors I.

The State of Florida initially refrained from intervening in the action. Instead, the State prepared for the

eventuality of a judgment in favor of the federal government. Florida assisted the United States in the lawsuit[11] and entered into preliminary negotiations regarding the disposition of the Atocha's treasure should the federal government prevail.[12] The adverse judgment left Florida in the cold.

In April 1978, after this Court's judgment for Treasure Salvors, the district court issued a warrant for arrest in rem. The warrant directed the marshal

[11]An attorney for the Florida Secretary of State, the agency that administers the Division of Archives, worked with the federal government on the case and monitored, for Florida, the progress of the litigation.

[12]The Division of Archives was negotiating with the Department of the Interior during the course of the litigation for an antiquities permit. Apparently, if the United States had been successful, the Division would have received an antiquities permit for the wreck site.

to take possession of all artifacts from the vessel in the custody or control of the State's Division of Archives' office in Tallahassee.[13] Florida filed a motion to quash the arrest warrant and successfully sought an emergency stay of the district court's order from this Court. In Re: State of Florida, Department of State, No. 78--1763 (5th Cir. April 12, 1978). In accordance with this Court's order, on April 14, the district court stayed the execution of the arrest warrant.

This temporary ban on the execution of the warrant for arrest did not halt the legal maneuvers. The district court

[13]Tallahassee is located in the Northern District of Florida. The marshal was instructed to bring the remnants of the vessel and her cargo into the custody of the district court in the Southern District.

denied Florida's motion to quash the warrant and granted Treasure Salvors' motion of April 17 to require the State of Florida to show cause[14] why it should not be ordered to transfer the artifacts in its possession to the custodians appointed by the district court.[15] The State answered, asserting that the court lacked jurisdiction and that Florida owned the artifacts in the possession of the Tallahassee office of the Division of Archives. On July 27 and 28 the district judge held a full evidentiary hearing on

[14]This order to show cause is known as ancillary process. Supplemental Admiralty Rule C(5).

[15]The district judge had previously appointed Treasure Salvors substitute custodians. Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel, No. 75--1416 (S.D.Fla., Oct. 28, 1975).

the jurisdictional issues and the merits of the order to show cause.[16]

After the hearing, the district judge filed a Memorandum Order containing extensive findings of fact and conclusions of law. 459 F.Supp. 507. The judge found that the order to show cause was properly issued. The court then held that the State of Florida was bound by the earlier judgment in Treasure Salvors I. Alternatively, the trial judge held that the suit to determine title to the artifacts was not barred by the eleventh amendment and that Florida's claim of ownership was without merit. The trial judge directed the State to deliver the

[16]In order to expedite the litigation, Treasure Salvors agreed to allow the Division of Archives to serve as temporary custodian of the disputed artifacts.

artifacts to the district court. The State of Florida then instituted this appeal. This Court is persuaded that the district court's alternative holding is correct, and we affirm.[17]

Eleventh Amendment

Florida's initial jurisdictional contention is that the order to show cause directed at the Division of Archives is barred by the eleventh

[17]This Court declines to either affirm or reverse the trial judge's innovative res judicata analysis. The preclusion issues raised by the district court's opinion are reserved for another day.

amendment.[18] The State asserts that it owns the artifacts in dispute and thus the district court's attempt to adjudicate ownership is, in essence, a suit against a state. Florida argues that since it has not waived its eleventh amendment protection by voluntary assertion of a claim or defense, see Gardner v. New Jersey, 329 U.S. 565, 67

[18]U.S. Const. amend. XI provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Although the eleventh amendment is not literally applicable to suits against a state by her own citizens, the Supreme Court has construed the amendment to cover such actions. Edelman v. Jordan, 415 U.S. 651, 662, 663, 677 n. 19, 94 S.Ct. 1347, 1355, 1362 n. 19, 39 L.Ed.2d 662 (1974).

S.Ct. 467, 91 L.Ed. 504 (1947), the district court lacked jurisdiction.

The Supreme Court has held that the eleventh amendment applies to admiralty in rem actions. In re State of New York, 256 U.S. 490, 41 S.Ct. 588, 65 L.Ed. 1057 (1921). In a companion case, In re State of New York, 256 U.S. 503, 41 S.Ct. 592, 65 L.Ed. 1063 (1921), the Court provided guidance for evaluating eleventh amendment claims in admiralty in rem actions.

In that case the administrators of Evelyn McGahan's estate filed a libel in admiralty against a tug, the Queen City, alleging that the negligent operation of the tug caused McGahan's death. The State of New York entered a special appearance and filed a verified affidavit suggesting that the district court lacked jurisdiction because the vessel was the

State's property, and had been in its possession and control at the time of the accident. The libelants offered nothing to controvert the State's affidavits. The district court rejected New York's claim of immunity and the Supreme Court reversed.

The Court first focused on the district judge's refusal to accept the State's assertion of ownership. "We deem it clear . . that the verified suggestion presented by the Attorney General of that state . . ought to be accepted as sufficient evidence of the fact [of ownership], at least in absence of a special challenge." Id. at 509 (emphasis added). The Court held that the district judge, given the uncontroverted claim to the vessel, should have acknowledged the State's ownership. It went on to con-

clude that admiralty in rem process cannot be issued on public property of a state "used and employed for public and governmental purposes." Id. at 511.

The Queen City tells us that when a state submits uncontroverted evidence of ownership in an admiralty in rem action, the district court is bound to accept the assertion and apply the eleventh amendment accordingly. In the case at bar, however, we have a controverted claim of ownership. Treasure Salvors offered evidence and legal arguments to show that it, and not Florida, owned the artifacts from the Atocha. Such an offer is the "special challenge" that the Supreme Court envisioned in the Queen City. This challenge operates to rebut the presumption of validity attributed to a state's ownership claim.

Once an appropriate challenge is made, a district judge is no longer compelled to conclude that the state owns the res in dispute. Instead, the Court must make a jurisdictional determination very similar to that made in the classic "jurisdiction to determine jurisdiction" line of cases. In that genre, the pivotal jurisdictional question involves essentially the same analysis as is posed by the merits of the case. See United States v. United Mine Workers, 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed.2d 884 (1957). Where "the issue of jurisdiction is inextricably intertwined with the merits of the controversy," the court retains the case and resolves the issue, since federal courts "always have jurisdiction to determine our jurisdiction." Nestor

v. Hershey, 425 F.2d 504, 511 (D.C.Cir. 1969).[19]

In the case at bar, ownership of the salvaged items is determinative of both the eleventh amendment and the merits. Since we agree with the trial court's assessment that Florida lacks an ownership interest in the artifacts, see pp. 1348-1349 infra [A43-50], we affirm the judge's holding that the order to show

[19]This approach is especially desirable in admiralty in rem actions. Federal courts have exclusive jurisdiction over admiralty in rem proceedings. Madruga v. Superior Court of California, 346 U.S. 556, 74 S.Ct. 298, 98 L.Ed. 290 (1954), G. Gilmore and C. Black, The Law of Admiralty § 1-13 (2d ed. 1975). If the mere assertion of ownership by a state of a res was sufficient to invoke the eleventh amendment, petitioners such as Treasure Salvors would find themselves stranded without a forum in which to litigate their claim.

cause is not, in this case, a suit against a state.[20]

Jurisdiction and Process

Given the lack of eleventh amendment and sovereign immunity problems, it must be determined whether the district court had the power to issue the "show cause order" and adjudicate the merits of the ownership claims. A careful analysis of the record establishes that admiralty jurisdiction provided the district court a firm foundation for its actions.

Admiralty in rem jurisdiction generally requires that the res be present in the district when the suit is filed or during the pendency of the

[20]Our holding that this action does not involve a suit against a state also disposes of Florida's claim that it has not waived sovereign immunity.

action.[21] Platoro Ltd., Inc. v. Unidentified Remains of a Vessel, 508 F.2d 1113, 1115 (5th Cir. 1975). The fact that a res was at one time within the district is insufficient to establish in rem jurisdiction. Id. at 1116. The crux of the State's argument is that the artifacts in dispute were not present in the Southern District of Florida when this litigation began back in 1975 and never were present in the Southern District at any time during the litigation. Given the general requirement of presence, the absence of the items in dispute, the State argues, deprive the

[21] In Treasure Salvors I this Court held that a party may waive the requirement that a res be present within the district and consent to a court's admiralty in rem jurisdiction. 569 F.2d at 335. Florida, however, has not consented to waive the usual jurisdictional requirements.

district court of in rem jurisdiction and thus the power to issue the order to show cause and adjudicate the ownership interest in the particular artifacts held in Tallahassee.

The State misconceives the nature of the district court's exercise of jurisdiction. It is undisputed that most of the artifacts recovered from the Atocha were present in the Southern District of Florida when the litigation began.[22] The district court clearly had the power to adjudicate the ownership of the artifacts located in its district. The issue before this Court is whether the presence

[22]Under the salvage contract between Treasure Salvors and Florida, Florida received 25% of the finds. Treasure Salvors kept its share of the artifacts recovered either at its headquarters in Key West or in a bank in Key West. See note 9 supra.

of the artifacts in the Southern District provided a sufficient foundation for the trial judge's order to show cause aimed at artifacts being held by the State in the Northern District of Florida. It is this Court's conclusion that the trial court was authorized to issue ancillary process in this case by Supplemental Admiralty Rule C(5).

Rule C(5)[23] provides that where

[23]Supplemental Admiralty Rule C(5):
(5) Ancillary Process. In any action in rem in which process has been served as provided by this rule, if any part of the property that is the subject of the action has not been brought within the control of the court because it has been removed or sold, or because it is intangible property in the hands of a person who has not been served with process, the court may, on motion, order any person having possession or control of such property or its proceeds to show cause why it should not be delivered into the custody of the marshal or paid into court to abide the judgment; and, after hearing, the court may enter such judgment as law and justice may require.

in rem process has already been served and where part of the property that is the subject of the action is not within the control of the court "because it has been removed or sold," the court may order the party in possession to show cause why the property should not be delivered to the custody of the marshal. Rule C(5) goes on to state that after the show cause hearing, "the court may enter such judgment as law and justice may require."

There is no doubt that in rem process was served with respect to the salvaged articles from the Atocha, and some of the artifacts were not within the Southern District because they had been removed to the Northern District pursuant to the contract between Florida and Treasure Salvors. In this case, these

facts alone do not justify the show cause order directed at the Division of Archives. It must also appear that: (1) the district court had control over a sufficient amount of the res to justify ancillary process and (2) ancillary process can be issued outside the district.

The rulemakers only contemplated the use of ancillary process where the major portion of the res is within the control of the court. See Notes of Advisory Committee on Rules, 28 U.S.C.A. Supplemental Rule C (1970); 7A Moore's Federal Practice ¶C.15 at 700.4, 700.5 (2d ed. 1979); The George Prescott, 10 Fed.Cas. 222 (E.D.N.Y. 1865) (holding that under Admiralty Rule 9 ancillary process can reach property appurtenant to the arrested res, even though the property was removed from the res prior to seizure).

The draftsmen did not intend to allow the presence of a portion of a res to support the issuance of ancillary process when the majority of the res is located outside the district. 7A Moore's supra at 700.4. Given the general requirement of presence of the res to support in rem jurisdiction, a rule allowing a small part of the res to support issuing ancillary process against the major portion of the res would be to allow the proverbial tail to wag the dog. Jurisdiction over the extra-territorial portion of the res in such a situation can only be obtained by original process. Id.

For the purposes of ancillary process, it is apparent that the district court in the case at bar had "control" over a sufficient portion of the res to warrant the use of ancillary process. In

making the sufficiency determination, the district court properly was entitled to consider the main body of the Atocha (that part still resting on the continental shelf) as being within its "control." The bulk of the Atocha lay buried in international waters forty nautical miles off the Florida coast, not in another district. The district court did everything possible to bring the vessel within its control.[24] Indeed, as a practical matter, it was impossible to bring the remainder of the vessel within any court's territorial jurisdiction on

[24]The court ordered the marshal to arrest the vessel and bring it within the court's physical control. Alternatively, the court appointed Treasure Salvors as custodian of the vessel "for possession and safekeeping . . . until further order of this court." On the facts of this case, this virtually placed the vessel in custodia legis. Treasure Salvors I, 569 F.2d at 335, n.5.

reasonable notice. Finally, there was little danger that significant portions of the res could escape an in rem decree. Treasure Salvors I, 569 F.2d at 335. In light of the realities of the situation, the district court's assessment that it had control over a sufficient portion of the Atocha was correct and this was a proper case for ancillary process. Cf. Id. at 334 (Admiralty in rem jurisdiction is a legal fiction designed to aid courts in "finding the most practical and efficacious means of resolving the disputes before them").

Even given that this was a proper case for ancillary process, it must still be ascertained whether ancillary process may be issued outside the district but

within state boundaries.[25] This determination hinges on the applicability of Supplemental Admiralty Rule E(3)(a).

Rule E(3)(a) provides:

> (3) Process.
>
> (a) Territorial Limits of Effective Service. Process in rem and of maritime attachment and garnishment shall be served only within the district.

(emphasis added). In the Advisory Notes the draftsmen, in commenting on Rule E(3)(a), stated that "process requiring seizure of property should continue to be served only within the geographical limits of the district." Notes of Advisory Committee on Rules, 28 U.S.C.A. Supplemental Rule E (1970) (emphasis added). Ancillary process, however, does

[25] We pass no judgment, one way or another, on whether ancillary process may be effectuated across state lines.

not require the seizure of property. Rule C(5). The rulemakers appear not to have intended for Rule E(3)(a) to govern ancillary process.

There are two policy reasons that also support the conclusion that Rule E(3)(a) does not govern ancillary process. First, as the district judge noted, limiting ancillary process to the district would produce a multiplicity of lawsuits. 459 F.Supp. at 519. New lawsuits would have to be filed in each district to which a portion of the res had been removed. Such a procedure could hardly be classified as a valuable expenditure of judicial resources. Second, "to the extent a decree in rem may be said to affect all the normal incidents of the arrested res, it may be necessary to give extraterritorial effect to

ancillary process to enable the court to bring within its control all property its decree will affect." 7A Moore's, supra at 700.10. The Advisory Committee Notes and policy rationales compel the conclusion that Rule E(3)(a) was not designed to govern ancillary process.

Supplemental Admiralty Rule A provides that the general Rules of Civil Procedure govern actions in rem in the absence of a contrary Supplemental Rule.[26] Federal Rule 4(f) controls the general rule concerning the territorial

[26]Supplemental Admiralty Rule A, in pertinent part, states:

> The general Rules of Civil Procedure for the United States District Courts are also applicable to the foregoing proceedings except to the extent that they are inconsistent with these Supplemental Rules.

limits of process.[27] In accordance with Supplemental Rule A, Federal Rule 4(f) controls the limits of effective service in the case at bar. Rule 4(f) states that all process, other than subpoenas,

[27]Federal Rule of Civil Procedure 4(f) provides:

(f) Territorial Limits of Effective Service. All Process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state. In addition, persons who are brought in as parties pursuant to Rule 14, or as additional parties to a pending action or a counterclaim or crossclaim therein pursuant to Rule 19, may be served in the manner stated in paragraphs (1)-(6) of subdivision (d) of this rule at all places outside the state but within the United States that are not more than 100 miles from the place in which the action is commenced, or to which it is assigned or transferred for trial; and persons required to respond to an order of commitment for civil contempt may be served at the same places. A subpoena may be served within the territorial limits provided in Rule 45.

may be served anywhere within the boundaries of the state in which the district court is located. Ancillary process here was served on the Division of Archive's [sic] office, located in the northern part of the state. Rule 4(f) was satisfied.

In sum, the trial judge had jurisdiction to issue ancillary process, and the process was effectuated within the state in accordance with Federal Rule 4(f). The trial court properly reached the merits of the dispute.

The Merits

Finally, this Court's attention is directed to Florida's contention that the district court erred in holding that the State had no interest in the artifacts from the Atocha and ordering the transfer of the items to the marshal for

delivery to Treasure Salvors. A careful review of the record and the basic legal principles of contract law compel the conclusion that the trial court's order should be affirmed.

The facts underlying the merits of this case are quite simple. Beginning in 1971, Treasure Salvors and the State of Florida entered into a series of annual contracts governing the salvage of the Atocha. Both parties entered into these agreements under the impression that the seabed on which the Atocha lay was state land. Treasure Salvors agreed to relinquish 25% of the items recovered in return for the right to salvage on state lands. In 1975 the Supreme Court, in United States v. Florida, 420 U.S. 531, 95 S.Ct. 1162, 43 L.Ed.2d 375 (1975), held that the part of the continental

shelf on which the Atocha was resting had never been owned by Florida. It was at this point that Treasure Salvors sought to be declared owner of the Atocha.

Even the briefest of glances at these facts cannot help but invoke thoughts of the doctrine of mutual mistake[28] and call to mind the seminal case of Sherwood v. Walker, 66 Mich. 568, 33 N.W. 919 (1887). Sherwood involved the classic remedy, "replevin for a cow." Plaintiff had agreed to purchase Rose 2d of Aberlone from defendants for $80. When the plaintiff tendered the money, the sellers refused to accept it and declined to yield Rose. At trial the

[28]In determining the existence of mutual mistake, there are no principles peculiar to admiralty. Sicula Oceanica S.A. v. Wilmar Marine Engineering & Sales Corp., 413 F.2d 1332 (5th Cir. 1969).

sellers introduced evidence establishing that at the time of the argument both parties thought Rose was barren and could not breed. Only in the interim, between the agreement to sell and the buyer's tender of the funds, was it discovered that Rose was with calf.[29] This mistake, sellers argued, went to the root of the parties' agreement. The Michigan Supreme Court agreed and allowed the sellers to avoid their contractual obligation.

The case at bar presents another example of mutual mistake. The parties entered into the salvage contracts under the mistaken assumption that the State of Florida owned the land. But for this belief, the Division of Archives and

[29]Rose, with calf, was worth approximately seven times as much as a barren Rose.

Treasure Salvors would not have executed the agreements. The trial court correctly held that the parties made a mutual mistake.

The facts of this case also raise the common law doctrine of failure of consideration.[30] Courts have long been reluctant to delve into the adequacy of consideration. See e.g., Sir Anthony Sturlyn v. Albany, 1 Cro.Eliz. 67 (Q.B. 1587); Westlake v. Adams, 5 C.V. (N.S.) 248, 265 (C.P. 1888) ("It is an elementary principle, that the law will not enter into an inquiry as to the adequacy of consideration . . .."). A different approach, however, has been taken where there is a failure of consideration.

[30]Like mutual mistake, there are no principles of failure of consideration peculiar to admiralty. [See A45, n. 28, supra].

> The law aptly terms an agreement to do an act or to pay money or other thing where there is no consideration for it a nudum pactum--a naked agreement--a promise without legal support, which the law will not enforce, no matter whether verbal or written, or however earnestly and solemnly made.

Jones v. McCallum, 21 Fla. 392, 393, 395 (1885).

In the case at bar we have a failure of consideration. In return for 25% of the finds, the State of Florida offered Treasure Salvors the "right" to conduct a salvage operation on lands in which the state had no interest. There was a promise without legal support.

Where there is a failure of consideration, the injured party is free, upon discovery, to rescind the agreement and recover back what he has paid. See

United States v. Haynes School Dist. No. 8, 102 F.Supp. 843 (E.D.Ark.1951). Treasure Salvors sought to rescind the contracts and recover back all the artifacts as soon as United States v. Florida was handed down. The district judge was acting well within his authority when he ordered the Division of Archives to deliver the artifacts in its possession to the marshal so that the salvaged items might be transferred to Treasure Salvors.

The State argues that the contracts between the parties should be declared valid because, at the time they were executed, the Florida Constitution stated that Florida owned the submerged lands holding the Atocha. In United States v. Florida, however, the Supreme Court held that this ownership claim was without

merit and that the lands never belonged to Florida. A holding that the State's incorrect claim of ownership is sufficient to support the contracts would operate to overturn the doctrines of mutual mistake and failure of consideration. The invitation to do so must be declined.[31]

Conclusion

The district court had jurisdiction pursuant to Supplemental Admiralty Rules (C)(5) and (A) to issue the "show cause order" and adjudicate the merits of the State's ownership claim. Neither the eleventh amendment nor sovereign immunity prohibited such action. This Court's re-

[31]There is some philosophical support for the position advocated by the State. See R. Descartes, Discourse on Method (1637) ("Cogito, ergo sum"--"I think, therefore I am.")

view of the record reveals that the trial judge's conclusion that the State did not have an ownership interest in the artifacts is correct. The judgment of the district court is

AFFIRMED.

ALVIN B. RUBIN, Circuit Judge, dissenting:

Respectfully, I dissent from the conclusion reached by my brethren that the district court had jurisdiction. Because the State of Florida contended that it had title to the property within the jurisdiction of the court, the eleventh amendment deprived the district court of jurisdiction to adjudicate the State's title or lack of it. Moreover, if the district court was not barred from asserting jurisdiction by the eleventh

amendment, it lacked in rem jurisdiction over the wreck.

The Eleventh Amendment is sweeping:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State. . . ."

While the amendment in terms applies only to suits by citizens of another state, it also precludes jurisdiction over a suit by the citizens of a state against that state. Hans v. Louisiana, 134 U.S. 1, 3, 10 S.Ct. 504, 505, 33 L.Ed. 842 (1890).

Although, in briefs, the State of Florida does assert that it owns the artifacts in dispute, it has not waived its eleventh amendment immunity. It correctly asserts that the plaintiffs cannot

bring it into a federal court to test its title to the artifacts.

Neither of the cases known as In re New York, 256 U.S. 490, 41 S.Ct. 588, 65 L.Ed. 1057 (1921) and 256 U.S. 503, 41 S.Ct. 592, 65 L.Ed. 1063 (1921), holds that a state can be brought involuntarily into an admiralty court for an adjudication of its property rights. In those cases, a tug had been libelled in a federal court. The state asserted an uncontroverted claim to ownership of the tug and intervened. The Supreme Court held [sic] the admiralty court could not issue in rem process against public property of the state. While it said, in reaching this conclusion, that the state's suggestion of ownership ought to be accepted in the absence of a special challenge, I do not understand this to

imply that, if there is a controverted claim of state ownership, the controversy becomes an appropriate subject for admiralty jurisdiction. Such a conclusion is particularly difficult to reconcile with the eleventh amendment when, as here, the determination of ownership involves the adjudication of an underlying contract dispute between a citizen of the state and the state itself, a purely local question.

The doctrine that a court has jurisdiction to determine its own jurisdiction does not permit it to decide the merits of a suit against the state. Once the state appears and asserts title to the property in dispute the court's jurisdiction is ended. In essence, the suggestion by my brethren that the court can determine whether it has jurisdiction of

a suit over state-claimed property by looking to the merits is equivalent to asserting that suits against a state are permitted by the eleventh amendment if the result is that the state loses.

The decision in Tindal v. Wesley, 167 U.S. 204, 17 S.Ct. 770, 42 L.Ed. 137 (1897) is not apposite here because the judgment in that dispute did not determine the rights of the state. In deciding that a claimant to property might sue persons preventing him from obtaining possession even though the possessors held the property on behalf of the state, the court reasoned that this was not an action against the state within the meaning of the Constitution because judgment would not conclude the state. Id. at 221, 17 S.Ct. at 777. Here the district court did precisely what was implicitly

forbidden by Tindal: it concluded the state from claiming ownership of the property.

It is, I think, arguable that under Tindal the writ of arrest of the salvaged articles was proper because it was directed to certain named individuals and simply brought the articles into possession of the court. However, when the court went on to adjudicate the ownership of these articles, it determined a claim against the state. It decreed that Treasure Salvors and Armada Research Corporation have full title to the salvaged articles and that the contract under which the state had possessed some of the salvaged treasure was invalid. It seems to me that this is the precise result barred by the eleventh amendment.

Our decision on the first appeal is not res judicata of this claim. We there expressly modified the district court's order adjudicating title to Treasure Salvors as against all other possible claimants and limited the effect of the decree saying,

> . . . the district court properly adjudicated title to all those objects within its territorial jurisdiction and to those objects without its territory as between plaintiffs and the United States. In affirming the district court, we do not approve that portion of its order which may be construed as a holding that plaintiffs have exclusive title to, and the right to immediate and sole possession of, the vessel and cargo as to other claimants, if any there be, who are not parties or privies to this litigation. (Emphasis supplied.)

569 F.2d at 335-36.

The district court found that the State of Florida was bound by the decree on the basis that it was privy to the litigation because it had stood by, let the United States litigate and failed to intervene. These actions are not, in my opinion, sufficient to make the State of Florida either a party to this litigation or privy to it. The United States asserted a counterclaim; Florida did not. If the United States had succeeded, it would have been decreed owner of the property; Florida could not have been. Florida was doubtless interested in the success of the United States, and hoped to benefit if the federal government were decreed to be owner. This bystander's interest in the success of one litigant over another is not equivalent to consent to a decree adjudicating the bystander's

title rights. Therefore, I cannot find that Florida's rights are determined by the district court's prior judgment, as modified by us.

In addition to lacking jurisdiction to adjudicate Florida's claim, the district court also was without in rem jurisdiction over a wreck that lay beyond the contiguous waters. See United States v. Williams, 617 F.2d 1063, 1073 (5th Cir. 1980) (en banc) for a definition of the extent of these waters. The court did everything it could to obtain jurisdiction, but the fact remains that the wreck was not within its territorial domain or, so far as the record shows, within the jurisdiction of any other sovereign. There are indeed res that lie beyond the jurisdiction of any court to determine in rem ownership. The waters

of the ocean are wide and deep. Many objects may sail on the ocean, float in it or lie at the bottom outside the in rem jurisdiction of any court.

This does not mean that disputes must go unadjudicated. The Florida state courts have in personam jurisdiction and there is no reason why ownership rights and contract issues cannot properly be adjudicated in that forum.

I would, therefore, dismiss this suit for lack of jurisdiction.

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF FLORIDA

No. 75-1416-Civ-WM

TREASURE SALVORS, INC., a corporation, and Armada Research Corp., a corporation,

Plaintiffs,

vs.

THE UNIDENTIFIED WRECKED AND ABANDONED SAILING VESSEL, her tackle, armament, apparel and cargo located within 2500 yards of a point a coordinates 24.31.5' north latitude and 82.50 west longitude, said sailing vessel is believed to be the NUESTRA SENORA de ATOCHA,

Defendant.

O R D E R

MEMORANDUM INCLUDING FINDINGS
OF FACT AND CONCLUSIONS OF LAW

INTRODUCTORY STATEMENT AND CONCLUSIONS OF LAW

This proceeding follows the receipt of the mandate from the United States Court of Appeals in Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, Nuestra Senora de Atocha, etc., 5 Cir., 569 F.2d 330 (C.A. 5th 1978), which affirmed, with certain modifications, the judgment of this Court determining the ownership of salvaged articles from the ship Atocha. In order to effectuate the mandate of the Fifth Circuit, and carry out the judgment of this Court, a warrant for arrest was issued to seize certain salvaged articles

in the possession of the Division of Archives, History and Records Management, Department of State, State of Florida, hereinafter, Division of Archives. The Division of Archives obtained a temporary stay of the warrant from the Fifth Circuit. Subsequently, the Court of Appeals dissolved the stay and allowed execution of the warrant. Pursuant to the warrant of arrest, the property in question was seized and is now in control and possession of this Court.

The Florida Division of Archives has challenged the jurisdiction of this Court and, subject to such objection, claims it is entitled to the property in question for various reasons, principally based upon a purported contract between the Division and Treasure Salvors.

For the reasons that follow, this Court holds: it had jurisdiction to issue the warrant of arrest and seize the property in question; the Division of Archives is bound by the earlier judgment of this Court; Treasure Salvors, under the judgment of this Court, as affirmed by the Fifth Circuit, is the owner of the property and entitled to possession; the claims of the Division of Archives to be the owner of the property, and to be accordingly entitled to the possession of such, are wholly without merit; and the present proceedings are not barred by the Eleventh Amendment to the Constitution of the United States nor by the Doctrine of Sovereign Immunity.

Before proceeding with this memorandum's discussion of the facts and reasons in support of the Court's

conclusions, prepared to satisfy the requirements of Federal Rule of Civil Procedure 52, it may be helpful to place these proceedings in proper perspective, in particular, the role of the agents and employees of the State of Florida, Division of Archives.

The Atocha was lost at sea because of a hurricane in 1622. Spain initially located the wreck and attempted salvage, recovering two cannons. But due to various perils of the sea the wreck was shortly thereafter lost and remained lost for over three centuries.

> [T]hen, in 1971, after an arduous search aided by survivors' accounts of the 1622 wrecks, and an expenditure of more than $2 million, plaintiffs located the Atocha. Plaintiffs have retrieved gold, silver, artifacts, and armament valued at $6 million. Their costs have

included four lives, among them the son and daughter-in-law of Melvin Fisher, plaintiff's president and leader of the expedition. 569 F.2d at 333.

As grave as the perils of sea are and were, the gravest perils to the treasure itself came not from the sea but from two unlikely sources. Agents of two governments, Florida and the United States, who have the highest responsibility to protect rights and property of citizens, claimed the treasure as belonging to the United States and Florida.

The finding of a great treasure from the days of the Spanish Main is not a cherished dream of only the United States and Florida citizens; countless people from other lands have shared such thoughts. It would amaze and surprise

most citizens of this country, when their dream, at the greatest of costs, was realized, that agents of respective governments would, on the most flimsy of grounds, lay claim to the treasure. As previously determined by this Court, the wreck site is outside the territorial boundaries of the United States and Florida, and under provisions of applicable treaties, which are the supreme law of the land, no claim can be made on the basis of sovereign ownership. This Court and the Fifth Circuit rejected a sovereign prerogative argument of the United States that all treasure found by its citizens anywhere in the world belonged to the United States as the American "Crown."

The zeal of the United States in claiming the salvaged articles of the

Atocha has been exceeded by the agents of the State of Florida. Although occasionally state employees are faulted for failure to protect state property, certainly this does not apply to the personnel of the Division of Archives who, in their unstinting efforts to claim property belonging to Treasure Salvors, have reacted as though Treasure Salvors were attempting to steal the old Capitol Building as well as the great Seal of the State.

The ship Atocha's association with Florida is tangential at best and certainly is not integral to the heritage and development of the State. The ship was bound on a voyage from Havana to Cadiz when the storm of 1622 drove it close to, but outside of, the boundaries of the later State of Florida. Its cargo

was not connected or associated with the Florida peninsula. Nevertheless, agents from the Division of Archives have persisted in wrongfully attempting to lay claim to the salvage recovered by Treasure Salvors or an interest therein. The Division of Archives did not find the Atocha or its cargo, and there is no basis in fact for suggesting that the Division ever could have located it, much less recovered it. Merely because agents of the State covet the treasure, does not give the agents the right to take it in the name of the State. It is ironic that the agents of the State are able to use resources of the State to deprive Treasure Salvors of what it justly and rightfully owns, especially when the record reflects that Treasure Salvors was

willing at one time to donate a portion of the salvaged articles to the State.

After presentation of evidence and argument before this Court, both the Division of Archives and Treasure Salvors filed extensive briefs. The Court agrees substantially with the reasons and arguments of Treasure Salvors.

THE DIVISION OF ARCHIVES IS IN PRIVITY AND BOUND BY JUDGMENT OF THIS COURT AS AFFIRMED BY THE FIFTH CIRCUIT

In resolving the jurisdictional issues and the arguments advanced by the Florida Division of Archives, it is significant that the present proceeding is not a new independent action, but concerns an appropriate issuance of an ancillary warrant of arrest in a pending admiralty case over which this Court's

jurisdiction is not questioned and where such ancillary warrant is necessary to carry out the judgment of this Court and the Fifth Circuit. Because of the importance of the nature of this proceeding and the relevancy of certain facts to the jurisdictional issues concerning the Eleventh Amendment and sovereign immunity, the disussion of those issues will be made at the conclusion of this memorandum.

If the Division of Archives is in privity there is no question that it would be bound by the judgment and its argument against jurisdiction would be of no avail. The Fifth Circuit ruled:

> To summarize, the district court properly adjudicated title to all those objects within its territorial jurisdiction and to those objects without its territory as between

> plaintiffs and the United States. In affirming the district court, we do not approve that portion of its order which may be construed as a holding that plaintiffs have exclusive title to, and the right to immediate and sole possession of, the vessel and cargo as to other claimants, if any there be, who are not parties or privies to this litigation. (Emphasis added) 569 F.2d at 335-336.

The crux of the Division of Archives' argument on the jurisdiction of this Court to issue the ancillary warrant of arrest is the assumption that it is not in privity nor bound by the judgment. The Division of Archives contends, in reference to the issuance of the warrant filed in this Court:

> The State of Florida was not at any time a party to this proceeding and had no interest whatsoever therein . . . The State of Florida was not a party on appeal.

In affirming the District Court, this Court expressly ruled:

> We do not approve that portion of its order which may be construed as holding that plaintiffs have exclusive title to, and the right to immediate and sole possession of the vessel and cargo as to other claimants, if any there be, who are not parties or privies to the litigation. Division of Archives' Reply to the Order to Show Cause, P.3.

By the above argument, the Division of Archives fully recognizess that, if it is bound by the judgment, its argument on lack of jurisdiction necessarily fails. The record reflects an involvement by the Division of Archives with the United States, together with a bypassing of an opportunity to intervene, which warrants a holding that the Division is and should be bound.

The Division of Archives did not intervene in the proceeding below, though it had an absolute right to do so. The Division of Archives had a contract with Treasure Salvors regarding the disposition of the treasure and a dispute arose concerning this contract. This dispute as to the terms and rights under the contract arose before Treasure Salvors and the United States went to court to settle the ownership of the treasure. The Division of Archives had notice of the initiation of the suit, and at times thereafter knew of and participated in the litigation of the suit. Being thus involved in the progress of the suit, the Division of Archives was fully aware that this suit was an in rem proceeding brought to

settle, for all the world, the ownership rights to the treasure. Furthermore, the Division of Archives was content to sit back and rely on the federal government to represent and protect its interests, which were now in repudiation of its earlier dealings with Treasure Salvors.

The interest of the Division of Archives was intertwined and interwoven with that of the parties to the extent that Division of Archives had a right to intervene under general principles of admiralty law in reference to the in rem proceedings, and a right, as well, under Rule 24. The conduct of the Division of Archives is important and lends significance to its failure to intervene. Under threats of arrest, the Division of Archives coerced the acceptance of a

salvage contract under which it gave nothing but a site mistakenly claimed as state submerged lands.

The Division of Archives had the right under the purported contract to divide the salvage, giving 75 percent to Treasure Salvors and retaining 25 percent at a time of its choosing. The contract had various forfeiture provisions under which the Division of Archives could claim the entire treasure. Although repeated requests were made to divide the salvage recovered, the Division of Archives refused. This refusal was in bad faith as part of a scheme by the Division to deprive Treasure Salvors of all salvaged treasure. After the Special Master in United States v. Florida, 420 U.S. 531, 95 S.Ct. 1162, 43 L.Ed.2d 375

(1975), determined that Florida boundaries did not in fact encompass the wreck site, and immediately after oral arguments in the Supreme Court, the Division of Archives knew its contract claim was invalid; therefore, it proceeded to immediately divide the treasure and take its purported share.

Based upon the decision of the United States Supreme Court, Treasure Salvors notified the Division of Archives that the salvage contract was nullity. Frustrated in its desire to obtain the entire treasure under the initial contract, the Division of Archives then encouraged the United States to claim the entire treasure. The Division of Archives' plan was to work out an arrangement with the United States over

division of treasure to the total exclusion of Treasure Salvors. To that end it did all it could to assist the United States in the litigation and relied upon the United States to prevail and to protect the interests of the Division of Archives.

After the United States' claim (as urged and supported by the Division of Archives in its dealings) was determined to be without merit by this Court and the Fifth Circuit, the Division of Archives attempted to paint itself as a total stranger to the litigation. It ill behooves the Division of Archives to play such a fast and loose game with courts. For all practical purposes, the Division of Archives was a party in fact, although not technically in name, to the litigation. Under all concepts of

fairness, it should be treated as a party and be bound by the decree--as indeed the cases so hold.

There is no question, given the contract claim regarding rights to the treasure, that the Division of Archives had a right to intervene under Rule 24(a) of the Federal Rules of Civil Procedure. The Division of Archives certainly had "an interest relating to the property or transaction which is the subject of the action" and was "so situated that the disposition of the action may as a practical matter impair or impede [the Division of Archives'] ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Rule 24(a)(2) Fed.R.Civ.P. In an analogous case to the instant suit, the Fifth Circuit made it

clear that rule 24(a) was to be interpreted broadly to give it full, practical effect. Atlantis Development Corp. v. United States, 379 F.2d 818 (C.A. 5th 1967). As the Court noted, intervention involves competing interests:

> [O]n the one hand, there is the private suitor's interests in having his own lawsuit subject to no one else's direction or meddling. On the other hand, however, is the great public interest, especially in these explosive days of ever-increasing dockets, of having a disposition at a single time of as much of the controversy to as many of the parties as is fairly possible consistent with due process. Id. at 824.

Considering the Division of Archives' contract, the in rem nature of the proceeding, and the practial reading of the rule on intervention, the Division

of Archives undoubtedly could have intervened had it so desired.

It is important to understand that the Division of Archives was aware that its rights were in jeopardy and purposely chose to rely on the federal government rather than to intervene. The Division of Archives knew of the suit from its initiation and chose to cooperate with the federal government rather than assert its own rights. During the course of the litigation, the Division of Archives engaged in several activities with the federal government. The Division of Archives negotiated with the federal government to obtain an antiquities permit. Had the United States prevailed in the suit, the Division of Archives would have received an antiquities permit from the Department of the Interior for

the wreck site. Furthermore, an attorney for the Florida Secretary of State (the agency which administers the Division of Archives) worked with the federal government on the case, and the Division of Archives engaged in preliminary negotiations regarding disposition of the treasure should the federal government win. The Division of Archives made the purposeful choice to cooperate with the federal government in prosecuting the case, and generally relied on the United States to protect its interest.

With the case decided differently than the Division of Archives desired, it now wishes to assert the interest which it should have protected by intervening in the initial suit. The policies underlying res judicata dictate that the Division of Archives should be bound

by the previous judgment. James & Hazard, in their text on Civil Procedure discuss a variety of circumstances where one not officially a party to an action may nonetheless be bound by a court's decree. In order to give effect to the principles of finality embodied in the doctrine of res judicata, courts may invoke equitable preclusion where a nonparty has been aware of the initial litigation and failed to intervene to protect its interests. James & Hazard, Civil Procedure § 11.31 (1977).

A party who purposely fails to intervene is bound under the law of this Circuit. In Aerojet-General Corp. v. Askew, 511 F.2d 710 (C.A. 5th 1975), the plaintiff sought specific performance of a contract, asserting a right to buy various lands from a state agency. The

Court held for the plaintiff. Subsequently, a Florida government unit (Dade County) came forward to halt conveyance of the land asserting that a state statute gave it absolute prior right to buy the land. The state had not utilized this argument in the original suit, nor had the local agency intervened, although well aware of the litigation. The Court held that the county was bound by the judgment.

In Aerojet, the local government contended that the district court should not have held it bound since it was not a party to the original suit. The Fifth Circuit responded:

> Under the federal law of res judicata, a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with

> his interests as to be his virtual representative. (Citations omitted).
>
> . . . . .
>
> The question whether a party's interests in a case are virtually representative of the interests of a nonparty is one of fact for the trial court. See Astron Industrial Associates, Inc. v. Chrysler Motors Corp., 5 Cir. 1968, 405 F.2d 958, 961. We find no reason to overturn the District Court's determination that Dade County "was in such close relationship to the parties to the first lawsuit before this Court, that its interests or the interests of those which it represents, were represented in that proceeding." D.C., 366 F.Supp. at 910. Aerojet-General Corp. v. Askew, 511 F.2d 710, 719-20 (C.A. 5th 1975)

Because the Division of Archives cooperated with the federal government, relying on it to protect the Division of Archives' interests, it should be bound

by the judgment and not permitted to ask the court to consider matters which could and should have been settled before.

The theory that a nonparty's failure to intervene should result in the decree being conclusive against that nonparty has been suggested in the United States Supreme Court. Justice Harlan in Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 114, 88 S.Ct. 733, 740, 19 L.Ed.2d 936 (1968), stated that:

> It might be argued that Dutcher should be bound by the previous decision because, although technically a nonparty, he had purposely bypassed an adequate opportunity to intervene.

Furthermore, this concept of equitable preclusion has been applied in admiralty cases. In Cummins Diesel

Michigan, Inc. v. The Falcon, 305 F.2d 721 (C.A. 7th 1962), a nonparty was held bound by a previous judgment where that nonparty had notice and an opportunity to intervene but failed to do so. Cummins involved an action in admiralty where plaintiff filed a libel in rem against a vessel, "The Falcon." Various claimants filed appearances and claimed interests and liens against the vessel. Later, one Holcomb, asserted that the court had no authority to determine the ownership of the vessel. Holcomb, however, had been given actual as well as constructive notice of the previous proceedings. Answering Holcomb's contention that the court had no authority to determine the ownership of the vessel, the court said

> This, however, did not create an issue between appellant and Holcomb, who

had an opportunity to intervene and assert any claim to ownership. This he failed or refused to do and, in our view, the decree is binding upon him the same as on all other parties who were in default. Id. at 723 [Emphasis added].

The United States Supreme Court has held that there may be times when the opportunity to intervene may be enough to bind a person not a party. Moore, 1B Federal Practice ¶0.411 p. 94 (1977, 78 Supp.). In Penn-Central Merger and N. & W. Inclusion Cases, 389 U.S. 486, 88 S.Ct. 602, 19 L.Ed.2d 723 (1968), numerous plaintiffs challenged the finding of the Interstate Commerce Commission in connection with a proposed railroad merger. These actions arose in district courts in several states, and all were continued in deference to the

New York Federal District Court. All plaintiffs were free to join the New York proceedings, but some chose to rely on others to represent their interests. Subsequently, these plaintiffs who had foregone their opportunity to intervene attempted to go forward with their complaints. On the issue of whether these plaintiffs should be bound, the Supreme Court said:

> [They] had an adequate opportunity to join in the litigation in that court following the stay of proceedings in the Middle District of Pennsylvania. As we noted, all district courts in which actions to review the Commission's finding or for injunctive relief were filed continued their proceedings in deference to the New York court. All parties with standing to challenge the Commission's action might have joined in the New York proceedings. In these circumstances, it necessarily

> follows that the decision of the New York court which, with certain exceptions, we have affirmed, precludes further judicial review or adjudication of the issues upon which it passes. Id. at 505-506, 88 S.Ct. at 612.

The foregoing cases clearly establish the principle that one who has an opportunity to intervene is bound by a judgment affecting his rights where he could have intervened but failed to do so to protect his interests. The facts establish the Division of Archives was fully aware of the preceding suit, consulted with the United States while they prosecuted the case and indeed negotiated with the federal government about securing a portion of the treasure. Since the Division of Archives had the opportunity but failed to intervene, instead relying on the United States to

further its interests, it should now be bound by the judgment rendered previously against the United States.

In addition to being bound because of failing to intervene to protect its interests rather than relying on the United States, the Division of Archives is bound because of its participation in the previous litigation. Professor Moore discusses situations where nonparties may be bound by previous judgments. Moore, 1B Federal Practice ¶0.411[6] p. 1552 (1974):

> If a non-party who thus participates in litigation has an interest sufficiently close to the matter in litigation, and has adequate opportunity to litigate in support of or in defense against the cause of action on which the suit is based, the policies underlying the doctrine of judicial finality require that the par-

> ticipating non-party should be bound by the resulting judgment to the same extent as though he were a party to the action. Id. at 1552.

This policy of binding nonparties who have notice of and participate in the prosecution of previous litigation has been upheld by the United States Supreme Court. Souffront v. Compagnie des Sucreries, 217 U.S. 475, 30 S.Ct. 608, 54 L.Ed. 846 (1910). In Souffront, the Supreme Court said:

> The case is within the principle that one who. . . assists in the prosecution or defense of an action in aid of some interest of his own, and who does this openly, to the knowledge of the opposing party, is as much bound by the judgment . . . as he would be if he had been a party to the record. Id. at 487, 30 S.Ct. at 612.

The record shows that the Division of

Archives knew of the suit and consulted with the federal government in the prosecution of the suit. Furthermore, the Division of Archives had an interest at stake in the previous action (an interest very similar to that of the United States) and worked with the United States, counting on the United States as a named party to represent its interest. Testimony shows that the Division of Archives had even preliminarily negotiated division of the artifacts which the United States sought to recover.

The Division of Archives was in privity with the federal government. Privity is a policy concept varying with appropriate circumstances. With regard to the principle of judicial finality Moore suggests that privity is to be found not so much in the fact that a

party is acting as the representative of a nonparty, but rather that the nonparty's participation justifies holding him bound by the judgment. Moore, 1B Federal Practice ¶0.411.[6] p. 1553 (1974). If a nonparty sits on the sidelines monitoring litigation, assisting in the suit, and at all times has the ability to intervene to protect its interest, it would offend the theory of judicial finality not to hold that nonparty bound by the judgment.

In order to be bound, the participating nonparty must have more than a mere academic interest in the outcome of the litigation. Moore outlines three types of interests which have been held sufficient to invoke res judicata effect. See Moore, 1B Federal Practice ¶ 0.411 [6] pp. 1555, 1558, 1559

(1974). While one of these interests would be sufficient, Moore points out that they often overlap, and a case will have characteristics of two or more of these interests. Id. at 1563.

The first type of interest is "[a] legal right, interest or duty dependent wholly or in part on the cause of action before the court for adjudication." Id. at 1555. Under this rule, a grantee who cooperates in a title suit between a third party and his grantor is bound when the grantee acquired his interest before the suit instituted. Souffront v. Compagnie des Sucreries, supra. Similarly, a lessee who participated as a nonparty in defending a condemnation suit was held bound by a judgment of condemnation. Sparks v. Gallagher, 114 Okl. 103, 243 P. 228 (Okla. 1925).

The second kind of interest which justifies binding a participating nonparty is "a proprietary right that will be affected favorably or detrimentally by the outcome of the litigation." Moore, 1B Federal Practice ¶ 0.411[6] p. 1558 (1974). In Hyman v. Regenstein, 258 F.2d 502 (C.A. 5th 1958), Hyman was an inventor and former employee of Regenstein's corporation, Velsicol. While employed at Velsicol, Hyman purportedly signed an agreement to assign all inventions and patents over to Velsicol. Subsequently, Hyman quit Velsicol and started his own corporation utilizing some of the inventions developed at Velsicol. Velsicol sued Julius Hyman & Co., and the Supreme Court of Colorado enjoined further use of the inventions finding the agreement to assign valid.

Julius Hyman & Co. v. Velsicol Corp., 123 Colo. 563, 233 F.2d 977 (1951); cert. denied 342 U.S. 870, 72 S.Ct. 113, 96 L.Ed. 654 (1951). Later Hyman sued Regenstein for damages for loss of profits on the inventions. The United States Court of Appeals for the Fifth Circuit held that the previous suit barred Hyman from contesting the validity of the agreement to assign. That issue had already been decided, and though Hyman had been sued in his corporate rather than individual capacity, he was aware of and involved in the previous litigation, and thus was bound by that judgment.

The idea of binding a participating nonparty is not novel in the Fifth Circuit. Before the Hyman case, Co-op Cab Co. v. Settle, 171 F.2d 40 (C.A. 5th 1948), held a nonparty bound. In Co-op,

the city of Athens, Georgia had denied permits to operate a taxi business to Co-op's competitors. The competitors sought judicial aid in obtaining the permits. The city defended with Co-op assisting as a nonparty. The trial court held that the permits must issue, and the Georgia Supreme Court affirmed. Thereafter, Co-op entered the picture as a party and attempted to enjoin the issuance of the permits. In affirming the district court's decision, the Fifth Circuit adopted the trial judge's language:

> I think the plaintiff, Co-op Cab Company, is bound by the decree in the [previous] proceeding. It is true that it was not a formal party in the case, but it had full knowledge, and an active interest in the litigation. It furnished and paid its own counsel to defend the

> defendant City. The issues here could have been raised in the proceeding.
>
> . . . . . .
>
> It may fairly be said that Co-op, in substance, adopted the State Court litigation for the protection of its contract and franchise, and relied on sustaining the City's refusal to grant Settle a franchise. I think Co-op is bound by the consequences. Id. at 42.

A third type of interest which has been held sufficient to bind a nonparty "exists when the nonparty has some legal right, interest or duty dependent on a question of fact or mixed fact and law that is in issue in the suit." Moore, 1B Federal Practice ¶ 0.411[6], p. 1559 (1974). After describing some cases which take a somewhat narrow view, Moore explains his position:

> But a different, and we are inclined to believe better, view, adopted by the Restatement of Judgments, [See Restatement of Judgments (1942) § 84] is that an interest in the determination of a question of fact or of mixed fact and law, with reference to the same subject matter or transaction, is a sufficient interest to bring a participating nonparty within the scope of the judgment's conclusive force. And the Restatement position receives support from cases in some areas. Id. at 1562. For a list of cases see n.25. Id.

Furthermore, Moore finds that some cases will qualify for the use of res judicata because all three types of interests are involved. Id. at 1563. A common example is a patent infringement suit. Judge Brown explained the concept in the case of Bros., Inc. v. W. E. Grace Mfg. Co., 261 F.2d 428 (C.A. 5th 1958).

The Division of Archives comes under all three of the interests described by Moore. The Division of Archives had a proprietary right that was affected by the litigation's outcome. Also, the Division of Archives' interest depended to an extent on questions of fact or mixed law and fact questions in issue in the previous suit. Having stood on the sidelines and advised the federal government in its prosecution of the case (in fact even admitting that the General Counsel for the Secretary of State worked with the United States in presenting its case), the Division of Archives cannot now be allowed to escape the conclusive effects of that judgment.

In addition to having an appropriate interest in the litigation, a nonparty, to be bound, must have a requisite degree

of participation in the suit. Moore, 1B Federal Practice ¶ 0.411[6] p. 1564 (1974).

> Generally speaking, the rule as to participating non-parties requires that the non-party have control, or at least joint control of the prosecution of defense of the suit . . . The non-party's control, however, need not be absolute: joint control by non-parties, or in conjunction with a party, is sufficient. Id. at 1564, 1566 [citing numerous cases].

Logically, the requirement of control is based on the need to insure that the nonparty truly had his day in court before involving the binding effect of the prior judgment. Where a nonparty participated in the progress of the suit, was at all times aware of the interests being adjudicated, and had the opportunity to intervene, less control

should be necessary to invoke the res judicata effect of the judgment. Though the Division of Archives did not control every aspect of the case, their attorney worked with the federal government; and the state and federal government cooperated in negotiations regarding the disposition of the Atocha, its cargo, etc. The Division purposely relied on the United States to protect its interests in the hope of obtaining a share without having to come into the litigation to assert its own claim. Being content to accept the representation of the federal government, and cooperate with the United States behind the scenes, the Division of Archives should be considered to have participated sufficiently to be bound as a nonparty. As the earlier discussion pointed out, the failure to intervene

should render the Division bound regardless of the amount of participation. The extent of the state's entanglement with and reliance on the federal government in this case simply serves to highlight the fact that equitable principles call for the Division to be bound.

ANCILLARY PROCESS AUTHORIZED TO ARREST SALVAGED ARTICLES PERTAINING TO RES THAT HAD BEEN REMOVED FROM THE SOUTHERN DISTRICT.

In the alternative, even if the Division of Archives were not bound by the prior judgment, this Court had jurisdiction to issue the warrant of arrest and seize the salvaged articles in question.

After receipt of the mandate, ancillary process was issued in reference to certain articles of salvage. The warrant for arrest to obtain the property

in question is authorized by Supplemental Admiralty Rule C(5). The Division of Archives has attempted to block service of the writ. The Court of Appeals for the Fifth Circuit refused to issue a Writ of Prohibition against the service of such writ. The Fifth Circuit in denying the Petition for Reconsideration and Clarification stated:

> The question of the jurisdiction of the District Court for the Southern District of Florida is for that Court to determine in the first instance on the basis of such record as may be developed in that Court.

The Division of Archives had taken the position before the Fifth Circuit that as a matter of law this Court could have no possible jurisdiction to issue the warrant for arrest in question under Admiralty Rules C(3) and the Platoro

Limited, Inc. v. Unidentified Remains of a Vessel, 508 F.2d 1113 (C.A. 5th 1975). Under the facts in this record, jurisdiction to issue warrant for arrest exists. The key fact is that this Court did acquire valid in rem jurisdiction and in personam jurisdiction in reference to the res situated within the Southern District and is merely seeking by ancillary process to recover a portion of salvaged articles that have been removed from the Southern District. In the instant case the warrant for arrest was ancillary in aid of the Court's unquestioned jurisdiction over the res previously arrested and seized within the Southern District. Further, Fed. R. Civ. P. 4(f) provides that all service of process, except subpoenas, by a Federal District Court is co-extensive with the state in which

it is sitting. Under Supplemental Admiralty Rule A, the Rules of Civil Procedure apply except where "inconsistent with these supplemental rules." Division of Archives contends that the warrant for arrest cannot issue to seize property in the Northern District because Supplemental Admiralty Rule E(3) limits the service of process under Admiralty Rule C(3) to the district. There is no such limitation, however, on ancillary process under Rule C(5).

The Division of Archives' interpretation is not warranted under the rules and is not consistent with the Platoro decision nor with the decision of the Fifth Circuit in the present proceedings. Indeed, in Platoro, the Court recognized in rem jurisdiction could be acquired and, thus, the process could be

issued, when the res was accidentally, fraudulently, or improperly removed from the District. 508 F.2d at 1116. The holding in Platoro is applicable only if no portion of the res had been validly arrested within the Southern District of Florida and if no other basis for the exceptions existed. The facts in Platoro differ markedly from the case at bar. Platoro involved the problem of invoking original in rem jurisdiction when no portion of the res was present in the district when the suit was filed. In contrast, the issue before this court centers on ancillary jurisdiction, since original jurisdiction has been established as stated. In Platoro, the plaintiffs had removed the salvage from the district. In the present case, the Division, rather than Treasure Salvors,

removed the articles of salvage from the Southern District. The Court finds this removal was improper and was accomplished pursuant to an invalid contract with Treasure Salvors. The Division then insisted on wrongfully detaining those portions of the res over which this Court had ancillary jurisdiction.

Professor Moore notes:

> Moreover, to the extent a decree in rem may be said to effect all normal incidents of the arrested res, it may be necessary to give extraterritorial effect to ancillary proces to enable the court to bring within its control all property its decree will affect. It would seem that the verdict is not yet in on whether Rule E(3) prevents issuance of ancillary process beyond the geographic boundaries of the district in which a major portion of that res is physically located. 7A Moore's Federal Practice ¶ C.15 p. 700.10.

If the verdict is not in, it is now. The use of ancillary process to protect and perfect an existing in rem jurisdiction over articles removed to another district is proper. A contrary result would produce a multiplicity of lawsuits and conflicting judgments, for it then would be necessary even though one federal district court had in rem jurisdiction, to institute new and separate proceedings in ever district where a portion of the res has been removed -- hardly a desirable goal. Pursuasive, if not controlling, authority for utilization of the ancillary process to obtain in rem jurisdictioin over some articles beyond the Court's boundaries, predicated on existence of a substantial portion of the res within such district, is the Fifth Circuit's opinion in this case.

case. The Fifth Circuit was well aware that although a substantial portion of the vessel's cargo was within the jurisdiction of the district court, it was not possible to physically bring all of the res within the district.

> Initially we note that for all practical purposes it was impossible to bring the entire remains of the vessel and her cargo within the territorial jurisdiction of the court. Thousands of items retrieved from the wreck site were brought into the district, but the bulk of the wreck lies buried under tons of sand in international waters. The district court did everything within its power to have the marshal arrest the vessel and bring it within the custody of the court. Thus, there is little danger that the res, against which any claims might be satisfied, will escape an in rem decree against it. 569 F.2d at 335.

Upholding jurisdiction in the instant case will be fully in accord with the admonition given by the Fifth Circuit:

> These decisions evidence the common concern of the courts with finding the most practical and efficacious means of resolving the disputes before them. An interest in rendering justice rather than an automatistic reliance upon rigid legalisms characterizes each of them. It is with these examples before us that we turn to an examination of the merits of the government's jurisdictional challenge. 569 F.2d at 334.

The validity of ancillary process outside the district is supported by the case of The Joseph Gorham, 13 F. Cas. 1136 (D. Conn. 1843). In Gorham, a ship was arrested in the Southern District of New York. Later, the ship was improperly removed to the District of Connecticut.

The federal court for the Southern District of New York petitioned the federal court for the District of Connecticut to arrest the vessel and return it to New York. The federal court in Connecticut complied with the request, noting that the right to possession properly belonged to the court in New York, and the marshal for that court "[may] have followed [the ship] anywhere and retaken her." Id. at 1140. Similarly, although this court has not petitioned the Northern District to arrest the res in the possession of the Division, the marshal for this district, pursuant to Gorham, could have come to the Northern District and effected the arrest himself.

With regard to process, the case of The Phebe, 19 F. Cas. 426 (D. Maine 1837) is also instructive. The Phebe involved

a challenge to the court's jurisdiction to issue process against the purchaser of a ship at a marshal's sale. The court stated that:

> Process in rem is founded on a right in the thing, jus in re, and the object of the process is to obtain the thing itself . . . It is not, therefore, a valid objection to the issuing of the process asked for, that the person against whom it is asked is neither a party in the cause nor an officer of the court. It is a process that lies against any person who by any means, whether under color of legal process from some other tribunal or without it, has obtained the possession of that which is in the legal custody of the court. Id. at 427.

The Division has obtained the possession of property which is in the legal custody of this Court. The property in question is part of the entire vessel over which this Court has complete juris-

diction, regardless of whether the property was removed from the vessel prior to the vessel's arrest. The George Prescott, 10 F. Cas. 222 (E.D.N.Y. 1865); The Joseph Warner, 32 F. Supp. 532 (D. Mass. 1939). Consequently, the warrant for the arrest of the property in the Northern District is a valid exercise of ancillary process in aid of existing jurisdiction, and, as such, the warrant should be executed.

The language of Rule C(5) governing ancillary process seems perfectly clear and applicable:

> In any action in rem in which process has been served as provided in this rule, if any part of the property that is the subject of the action has not been brought within the control of the court because it has been removed . . . The court may, on mo-

> tion, order . . . to show cause why it should not be delivered into the custody of the marshall . . .

The provisions of Rule C(5) were followed to the letter. This Court denied the Division of Archives' motion on the show cause.

The upholding of jurisdiction is also fully in accord with the provision of 28 U.S.C. § 1692 regarding property in different districts:

> In proceedings in a district court where a receiver is appointed for property, real, personal or mixed, situated in different districts, process may issue and be executed in any such district as if the property lay wholly within one district, but orders affecting the property shall be entered of record in each of such districts.

In the alternative, even if the Division of Archives were not bound by the pre

vious decree, this Court holds it acquired in rem jurisdiction over the articles of salvage in question through proper issuance of the ancillary warrant of arrest.

DIVISION OF ARCHIVES' CLAIM TO PROPERTY WITHOUT MERIT

The portion of the res seized under the warrant of arrest was comprised of articles of salvage recovered from a wreck site located outside the jurisdiction of the State of Florida and on lands not owned or possessed by the State of Florida. Section 267.061(1)(b), Florida Statutes, which purports to vest title in the State does not apply since the property was not on "sovereignty lands of the State." The Division of Archives has no right nor interest in such property other than what might exist

under an ultra vires contract between the Division and Treasure Salvors. Contrary to the Division of Archives' argument, the Supreme Court in United States v. Florida, 420 U.S. 531, 95 S.Ct. 1162, 43 L.Ed.2d 375 (1976), did not modify nor change the State of Florida's seaward boundary but merely defined it as it was and is. Nevertheless, the Division persists in arguing that the State's jurisdiction extends beyond the sovereign territorial waters of the United States for purposes of salvage. This Court rejects as specious a claim that the State for purposes of salvage has greater extraterritorial rights than the United States. The argument of Florida also would be in contravention to the Convention on the Outer Continental Shelf. April 29, 1958, 15 U.S.T. 471

(1964) T.I.A.S. No. 5578, 499 U.N.T.S. 31. The report of the International Law Commission written in conjunction with the Convention states:

> It is clearly understood that the rights in question do not cover objects such as wrecked ships and their cargos (including bullion) lying on the seabed or covered by the sand of the subsoil. 11 U.S. GAOR, Supp. 9 at 42, U.N. Doc A/3159 (1956).

The territorial rights and limits of the United States were determined by the Fifth Circuit in this case. 569 F.2d 330, supra. The Division of Archives has offered no creditable factual evidence to support its novel theories. This Court finds the wreck site of the Atocha from which the salvage articles in question were recovered was outside of Florida's jurisdiction.

Although the Division of Archives should have intervened earlier, at the stage where the Court acquired in rem jurisdiction over the present articles of salvage, the Division of Archives had the option to decide whether or not it would claim an interest in the property. The Division chose to assert, on the merits, a claim to the property. Under the judgment of this Court, as affirmed by the Fifth Circuit, Treasure Salvors has a valid claim to the property seized, unless the State asserts and establishes a superior claim.

Since the state asserts a claim in this proceeding to the property, it necessarily waives any Eleventh Amendment objections. Clark v. Barnard, 108 U.S. 436, 25 S.Ct. 878, 27 L.Ed. 780 (1883); Gunter v. Atlantic Coast Line Railroad

200 U.S. 273 (1906); Gardner v. State of New Jersey, 329 U.S. 565, 67 S.Ct. 467, 91 L.Ed. 504 (1974). See discussion of the Eleventh Amendment and Sovereign Immunity, infra. The Division of Archives obviously cannot ride both horses; it cannot properly assert a claim to ownership of the property and, simultaneously assert immunity under the Eleventh Amendment. These Supreme Court cases hold that when a state voluntarily places itself in the position of a suitor, it is deemed to have laid aside its sovereignty and to have assumed the status of an ordinary suitor so far as concerns any matters properly defensive.

In Langley v. Irons Land and Development Co., 94 Fla. 1010, 114 So. 769, 771-72 (1927), which remains the principal Florida case on invalidation of

contract as a result of mistake, the Florida Supreme Court adopted the following statements from 4 Ruling Case Law 506:

> The jurisdiction of equity to decree the cancellation of an instrument because at the time of its execution the parties, or even one of them, labored under a mistake of fact, is well recognized; and the rule is the same whether the instruments relate to an executory agreement, or one that has been executed . . . [T]he authorities are practically unanimous in holding that the mistake must not result from the want of that degree of care and diligence which would be exercised by persons of reasonable prudence under the same circumstances, or equity will not relieve against it. Moreover, a mistake such as will entitle one to cancellation must be material to the transaction and affect the substance thereof, rather than a mere incident or the inducement for entering into it.

In this regard, the general maritime law, controlling here, is on all fours with that of Florida. See Norris, supra §167; The Alert, 56 F. 721 (S.D.N.Y. 1893); The Clotilde, F.Cas. 2903 (D.C. Me. 1872) (contract declared invalid for mutual mistake). Under maritime law, a misstatement of fact by one of the parties will result in the contract being set aside. The Clandeboye, 70 F. 631 (C.A. 4th 1895).

The coercive acts of the Division of Archives in threatening arrest and confiscation voids the contract under the general maritime law. Crary v. The El Dorado, F.Cas. 3362 (S.D.N.Y. 1856). Contracts entered into because of compulsion, or inequality of bargaining position may be set aside. Norris, supra §§169,170.

Even without the compulsion and coercion of the part of the Division of Archives, in the present case, a mutual mistake of material fact--the location of the wreck site within Florida waters--provided each party's motivation to contract. Had the parties known that, in fact, the property did not lay upon state sovereignty lands there would have been no reason to contract regarding salvage operations. In addition, prior to the litigation to determine the boundary of the State, neither party exercising reasonable diligence could have avoided the mistake of fact. The contract was therefore invalid from the time of its execution, and the fact that it has been partially performed is of no consequence.

In addition to mutual mistake of material fact, the contract between the

Division of Archives and Treasure Salvors is invalid for lack or failure of consideration. See Marks v. Fields, 160 Fla. 789, 36 So. 2d 612 (1948); Jones v. McCallum, 21 Fla. 392 (1885). The contract between the parties dated December 3, 1974, included in Exhibit 1, recites that the State of Florida owns the land on which the wreck is located (page 1 of contract) and further recites that the State owns the wreck and all materials found therein (page 2 of contract). In consideration of Treasure Salvors' payment of $1,200.00 and covenants to salvage the sunken property, the Division of Archives conveyed to Treasure Salvors the salvage right to the property. The Division of Archives agreed to convey, at the completion of the salvage operation, 75 percent of the material salvaged.

There was at the very least a failure of consideration on the part of the Division under the statute on which the Division relies. Section 267.061(1)(b), Florida Statutes, provides:

> It is further declared to be the public policy of the state that all treasure trove, artifacts and such objects having intrinsic or historical and archeological value which have been abandoned on state-owned lands or state-owned sovereignty submerged lands shall belong to the state with the title thereto vested in the Division of Archives, History, and Records Management of the Department of State for the purpose of administration and protection. [Emphasis added].

Section 267.031(5), Florida Statutes, authorizes the Division of Archives to enter into contracts which are "necessary, expedient, or incidental to the performance of its duties or the

execution of its powers under this chapter."

Since the property was never actually located on Florida sovereignty submerged lands, the property did not belong to the State and, as a result, the Division lacked all authority to enter into a contract conveying salvage rights. Additionally, since the property was not owned by the State, because not located on sovereignty submerged lands, the Division was without authority to promise, as consideration for the contract, 75 percent of the property recovered. An early Florida case which is still applicable adequately expresses the controlling legal maxim:

> The law aptly terms an agreement to do an act or to pay money . . . where there is no consideration for it a nudum pactum . . .

> a promise without legal support, which the law will not enforce . . . Jones v. McCallum, 21 Fla. 392, 395 (1885).

The contract at issue here must be deemed invalid. Aside from the coercion shown, the contract was entered into on the basis of mutual mistake of a material fact and suffers from a complete lack or failure of consideration.

Rescission of the contract is a maritime remedy and courts have discretion in its application. Before rescission may be granted, it must appear that the parties can be restored to the positions they held prior to formation of the contract. If restoration of the status quo is not possible, rescission should not be granted. See McDonald v. Sanders, 103 Fla. 93, 137 So. 122, 126 (1931); Glass v. Craig, 83 Fla. 408, 36

(1922). But the fact that a contract is partially executed will not operate as a bar to rescission of the contract if rescission is otherwise warranted. Langley v. Irons Land and Development Co., 94 Fla. 1010, 114 So. 769, 771 (Fla. 1927).

Under facts of the present case the prties can easily be restored to their prior positions by distribution of the property in the possession of this Court to Treasure Salvors.

The right to rescission has not been waived by Treasure Salvors. In Rood Co. v. Board of Public Instruction, 102 So.2d 139 (Fla. 1958), the plaintiff was seeking rescission, on the basis of mistake, of a contract for sale of land and a deed executed pursuant to the contract. The court stated that the right to rescission

may be waived if, after acquiring knowledge of the mistake, the party seeking rescission either "remains silent when he should speak or in any manner recognizes the contract as binding upon him, ratifies or accepts the benefits thereof . . ." Id. at 142. Treasure Salvors did not remain silent after learning of the mistake, nor did it thereafter recognize the contract as binding upon either party. Instead, it notified the Division of Archives of the Supreme Court decision, suggested that the contract was null and void, removed the state agent from its vessel and, on July 19, 1975, formally declared the contract null and void.

Further, the maritime courts require of all parties to a maritime contract the utmost good faith before they can assert rights under the contract. Coercion and

compulsion are evidence of bad faith. The acts of the State, contrary to the interests of Treasure Salvors, who it now claims was their agent, are egregious acts of bad faith amounting to collusion to defeat the claims of a person standing in a fiduciary relationship to the State. See Norris, Law of Salvage, Ch. VIII, Misconduct of Salvors (1958). The maritime law allows the forfeiture of all salvage claims for acts of extreme bad faith of the nature outlined above. The action of the Division, in seeking to obtain an interest from the United States, constituted a repudiation by the Division of its contract with Treasure Salvors. In occupying a mutually inconsistent position in its dealings with the United States and with Treasure Salvors, the Division did not act in good

faith towards Treasure Salvors' rights. The Division performed no salvage service of value.

Additionally, the contract is invalid because the states cannot constitutionally alter general admiralty and maritime jurisdiction and congressional acts thereunder. The Fifth Circuit in its decision in this case stated:

> . . . although at least one state court has invoked English Common Law to award ownership of a sunken vessel to the sovereign, the "American Rule" vesting title in the finder has been widely recognized by courts and writers. (Citations omitted). We accept the "American Rule" as it has been uniformly pronounced in the courts of this nation for over a century. Treasure Salvors v. Unidentified Wrecked, etc., 569 F.2d 330, 343 (1978).

By this pronouncement, the Fifth Circuit puts into perspective the State's claim

to wrecked and abandoned vessels such as the one in the case at bar.

Norris observes:

> It is the policy of the general maritime law to encourage the salvaging of derelict marine property on, and in, navigable waters. The presumption by a state of title of possession to abandoned marine property on navigable waters raises the serious constitutional question of the interference by a state of what is essentially a federal problem. Norris, Law of Salvage, Section 157, p. 137 (1974 Cummulative Supplement).

We are concerned with substantive maritime law that has been the subject of innumerable federal statues, rules and regulations. The power of Congress to enact substantive maritime law was initially considered conferred by the Commerce Clause, e.g., The Daniel Ball,10 Wall. (77 U.S.) 557, 564 (1871); The

Robert W. Parsons, 191 U.S. 17, 24 S.Ct. 8, 48 L.Ed. 73 (1903). Later opinions firmly establish that the source of the Congress's power was the Admiralty grant itself, as supplemented by the Necessary and Proper Clause, as Justice Bradley said in Butler v. Boston and S.S.S. Co., 130 U.S. 527 9 S.Ct. 612, 619, 32 L.Ed. 1017(1889):

> [A]s the Constitution extends the judicial power of the United States to "all cases of admiralty and maritime jurisdiction and as this jurisdiction," is held to be exclusive, the power of legislation on the same subject must necessarily be in the national legislature and not in the state legislatures. (Emphasis added).

Accord: In re Garnett, 141 U.S. 1, 11 S.Ct. 840, 35 L.Ed. 631 (1891).

The insistence of the State that a finder of a wrecked and abandoned vessel not only does not get title but that it has the right or authority to prohibit salvage or, if granted, to regulate salvage is in direct conflict with substantive maritime law. Chapter 267, Florida Statutes, cannot be used to alter or prejudice the rights of a finder or salvager under applicable maritime law. For the State to insist that Chapter 267, Florida Statutes, governs the rights of a finder or salvager would lead to unconstitutionality of acts taken in such reliance.

This Court finds that Ch. 267.061, Florida Statutes, is not applicable to the articles of salvage in question. Because of the Division of Archives' insistence that the statute does control, the Court further finds that under the

provision of that chapter, the Division still would not be entitled to prevail in this action for the several reasons previously stated. In the alternative, Ch. 267.061, Florida Statutes, is unconstitutional based upon the holding in United States v. Diaz, 499 F.2d 113 (9th Cir. 1974), noted with apparent approval of the Fifth Circuit in this case. 569 F.2d at 340. The Diaz case held the federal statute 16 U.S.C. §433 concerning objects of antiquity situated on land owned and controlled by the Government of the United States to be unconstitutionally vague:

> Nowhere here do we find any definition of such terms as "ruin" or "monument" (whether historic or prehistoric) or "object of antiquity." The statute does not limit itself to Indian reservations or to Indian relics. Hobbyists

> who explore the desert and its ghost towns for arrowheads and antique bottles could arguably find themselves within the Act's proscriptions. 499 F.2d at 114.
>
> . . .
>
> In our judgment the statute, by use of undefined terms of uncommon usage, is fatally vague in violation of the due process clause of the Constitution. 499 F.2d at 115.

The court relied upon Connally v. General Const. Co., 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926), and Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).

The Florida staute claims ownership of such items as artifacts, objects of antiquity, monuments, memorials, treasure trove, shipwrecks, etc., and is substantially identical to the Federal Act. In

only one instance does the Florida Act attempt definition, and this definition is confusing. Treasure trove is defined as "gold, silver bullion, jewelry, pottery, ceramics, antique tools and fittings, ancient weapons, etc." The meaning of treasure trove at common law would not include articles of salvage.

> Treasure trove is a name given by the early common law to any gold or silver, plate or bullion, found concealed in the earth or in a house or other private place, but not lying on the ground, the owner of the discovered treasure being unknown. Livermore v. White. 74 Me 452, 456 (1883), Sovern v. Yoran, 16 Ore. 269, 20 P. 100, 8 Am.St. Rept. 293 (1888) (Emphasis added.)
>
> . . . [I]t is essential to the character of treasure trove that it shall have been concealed by the owner for safekeeping. 1 Am.Jur. 2d p. 6, Perry, Sovereign

Rights in Sunken Treasure, Land and Natural Resources Division Journal, U.S. Dept. of Justice, Vol. 7, No. 3, p. 89, 1969. (Emphasis added).

The extent of control over which the Division of Archives claims in reference to maritime salvage operations also raises a serious question of interference with the jurisdiction of the federal courts in admiralty and maritime matters.

No legislation is valid if it contravenes an essential purpose expressed by Act of Congress or works material prejudice to characteristic features of general maritime law, or interferes with proper harmony and uniformity of that law in its international and interstate relations. Southern Pacific Co. v. Jensen, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917), Clyde S.S. Co. v. Walker, 244

U.S. 255, 37 S.Ct. 545, 61 L.Ed. 116 (1917). No state has power to abolish the well recognized maritime rule concerning measure or recovery and substitute, therefore the full indemnity rule of the common law. See Chelentis v. Luckenbach S.S. Co., 247 U.S. 372, 38 S.Ct. 501, 62 L.Ed. 1171 (1918). The entire subject of maritime law including its substantive as well as its procedural features is under federal control. "The Congress thus has the paramount power to determine the maritime law which shall prevail throughout the contry." Detroit Trust Co. v. Barlum S.S. Co., 293 U.S. 21, 43, 55 S.Ct. 31, 38, 79 L.Ed. 176 (1934).

There can be no doubt that the attempt by the Division of Archives, under

the extremely vague terms of Chapter 267, Florida Statutes, to alter general maritime law is a new and unprecedented concept. Chapter 267 and its administrative interpretation in Chapter 1A-0.01 through 1A-31, Florida Administrative Code, seeks to completely govern search, salvage and the ultimate division of recovered items. Section 1A-31.09, Florida Administrative Code, goes so far as to claim all items recovered and then leaving to the Division of Archives the complete control of any division with the finder/salvor. The application of Chapter 267, Florida Statutes, to wrecked and abandoned vessels is beyond the state's power as it is maritime in nature.

By Section 9, Judiciary Act of 1789, 1 Stat. 76, 77, the District Courts of the United States were given "exclusive, original cognizance of all civil cases of admiralty and maritime jurisdiction; . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it" and this grant has been continued. 28 U.S.C. §1333. There can be no doubt that Congress has acted to regulate salvage. The Salvage Act of 1912, 37 Stat. 242 (1912), 46 U.S.C. 727-31.

The claim of the Division to the salvage articles based on the purported contract with Treasure Salvors is without merit. The claim of the Division for a salvage award is denied by the reasons previously set forth.

NEITHER ELEVENTH AMENDMENT NOR SOVEREIGN IMMUNITY BAR PRESENT PROCEEDINGS

The Division of Archives has urged in this Court and in the Fifth Circuit, on its application for stay and prohibition, that the present proceeding is precluded by the Eleventh Amendment to the Federal Constitution. Although the amendment when applicable can certainly bar an action against the State, the amendment is not violated under the structure of the present proceedings. As noted previously, the Division of Archives had the choice to claim an interest in the res in this proceeding. Since the Division of Archives chose to assert such a claim on the merits, it necessarily waived the Eleventh Amendment as to its claim. The situation is directly analogous to a state filing a claim to a

res under the jurisdiction of the Federal Bankruptcy Court. Gardner v. State of New Jersey, 329 U.S. 565, 573-74, 67 S.Ct. 467, 472, 91 L.Ed. 504 (1947):

> It is traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure. Wiswall v. Campbell, 93 U.S. 347, 351, 23 L.Ed. 923 (1826). If the claimant is a State, the procedure of proof and allowance is not transmitted into a suit against the State because the court entertains objections to the claim. The State is seeking something from the debtor. No judgment is sought against the State. The whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a res. It is nonetheless such because the claim is rejected in toto, reduced in part, given a priority inferior to that claimed, or

satisfied in some way other than payment in cash. When the State becomes the actor and files a claim against the fund it waives any immunity which it otherwise might have had respecting the adjudication of the claim. See Clark v. Barnard, 108 U.S. 436, 447, 2 S.Ct. 878, 882, 883, 27 L.Ed. 780 (1883); Gunten v. Atlantic Coast Line R. Co., 200 U.S. 273, 284-289, 26 S.Ct. 252, 256-258, 50 L.Ed. 447; Missouri v. Fiske, 290 U.S. 18, 24, 25, 54 S.Ct. 18, 20, 78 L.Ed. 145 (1933).

The admiralty proceedings before the Court following the supplemental process can be resolved on the basis of presentation and determination of the validity of the Division of Archives' claim. Other than determining that the Division of Archives' claim to the property is without merit, it is not necessary for this Court to adjudicate a claim by any of the parties against the State of

Florida. Accordingly, any separate claims against the Division of Archives are dismissed without prejudice.

In this case, the Court on April 6, 1978, after receipt of mandate, issued the ancillary warrant of arrest to aid and carry out the judgment of this Court as affirmed by the Fifth Circuit. The Motion for the warrant correctly stated that "the State of Florida and said L. Ross Morrell and James McBeth were privy to this litigation," and asserted facts reflecting that the warrant was in reference to this Court's existing jurisdiction as affirmed by the Fifth Circuit. The State of Florida obtained an emergency stay of the warrant from a circuit judge of the Fifth Circuit on April 12, 1978. It is significant to note that the warrant was <u>not</u> issued in response to

Treasure Salvors' Supplemental Complaint for Declaratory Judgment and Other Relief which was filed April 17, 1978.

In both this Court and the Fifth Circuit, the Division of Archives relies on In re State of New York, 256 U.S. 490, 40 S.Ct. 588, 65 L.Ed. 1057 (1921), which upheld the immunity of a state to an in personam suit in Admiralty under the Eleventh Amendment. The present proceedings, however, are in rem as the result of the issuance of ancillary warrant of arrest and are governed by holdings In re State of New York (the Queen City), 256 U.S. 503, 41 S.Ct. 592, 65 L.Ed. 1063 (1921), and In re Muir, 254 U.S. 522, 41 S.Ct. 185, 65 L.Ed. 383 (1921).

The Queen City case was a libel in rem, "to recover damages alleged to have been sustained through the death of

deceased by drowning due to the negligent operation of the Queen City . . . . " 256 U.S. at 508, 41 S.Ct. at 592. The Supreme Court after accepting as a jurisdictional fact that the Queen City was the "property of the State of New York" ruled that the State was exempt from the in rem proceeding against the vessel because it was "public property of a state used and employed for public and governmental purposes." 256 U.S. at 511, 41 S.Ct. at 593. The Court ruled that since the state's ownership of the vessel had been duly accepted in the proceedings below, the ownership now could not be contested. It is significant that the issue of ownership was treated as a jurisdictional fact for the Court to first determine as a prerequisite in determining the exemption. The Supreme

Court distinguished In re Muir where the Court had refused to issue a Writ of Prohibition against an in rem proceeding because the ownership of the vessel (British Government) was not clear under the record. The Supreme Court noted:

> [I]t is apparent that the status of the Gleneden, [the ship which may have been in British service] . . . is at best doubtful and uncertain, both as matter of fact and in point of law. The jurisdiction of that court is correspondingly in doubt, for it turns on the status of the vessel. the suit is still in the interlocutory stage. The court may take up again the question of its jurisdiction. If it does, the inquiry may proceed on other lines and the facts may be brought out more fully than before. 254 U.S. at 533.

The Fifth Circuit in this case denied the Writ of Prohibition noting that the question of jurisdiction was

first to be developed in this Court. As a jurisdictional fact this Court finds the Division of Archives is not and never was the owner of the ship Atocha, her tackle, apparel, cargo, etc. This Court finds as fact that the Division of Archives is not and never was the rightful owner of the articles of salvage from the ship Atocha that were seized by the ancillary warrant of arrest and which have been improperly removed and held by the Division of Arhcives; that the Division of Archives is not the owner of any right or interest in such property based upon the purported and invalid contract with Treasure Salvors; and that the Division of Archives was wrongfully withholding a portion of the res of the Atocha over which this Court was properly exercising in rem jurisdiction.

There is no Eleventh Amendment bar to the mere arrest of articles of salvage unless the state is the owner. If the state is not the owner, the court may proceed. It is axiomatic that the federal courts have jurisdiction to determine jurisdiction; e.g., United States v. United Mine Workers, 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884 (1947). This would of necessity require judicial determination of a state's immunity from jurisdiction. As reflected by the Supreme Court cases involving the Eleventh Amendment, the determination of the immunity question is a jurisdictional matter within the province of the courts; it is not both a self-proclaimed and self-determined ukase of the state.

The present admiralty proceeding thus involves a portion of the salvaged articles pertaining to a res that previously was properly brought before the jurisdiction of this Court. The Division of Archives' argument in reality is predicated upon a different situation: in essence the state argues that Treasure Salvors could not institute an independent action against the Division of Archives seeking a judgment for the value of the articles wrongfully taken by the Division of Archives. Perhaps the short answer to the Division of Archives' contention is that, even if this hypothetical situation were the case, under a controlling precedent of the Florida Supreme Court, sovereign immunity would not necessarily bar such action. As Justice Terrell ruled for the Florida Supreme

Court in State Road Department of Florida v. Tharp, 146 Fla. 745, 1 So. 2d 868 (1949):

> Immunity of the State from suit does not afford relief against an unconstitutional statute or against a duty imposed on a state officer by statute, nor does it afford a state officer relief for trespassing on the rights of an individual even if he assumes to act under legal authority. It will not relieve the State against any illegal act for depriving a citizen of his property; neither will it be permitted as a plea to defeat the recovery of land or other property wrongfully taken by the State through its officers and held in the name of the State. It will not be permitted as a City of refuge for a State agency which appropriates private property before the value has been fixed and paid. 1 So. 2d at 869.

The Eleventh Amendment is a shield to protect the fiscal integrity of the State. It is not a sword whereby agents of the State can take and appropriate the property and lives of its citizens without due process. The public policy of Florida, as held by the State's highest Court, does not tolerate misguided State employees trampling upon the basic constitutional rights of its citizens and then covering up such wrong-doings under a guise of sovereign immunity. Although the State must act through its agents, the wrongful activities of the employees of the Division of Archives are not immune. The Court finds that the agents for the Division of Archives wrongfully, and in violation of basic due process rights under Federal and Florida law, deprived Treasure Salvors of its property.

Although unnecessary to the resolution of the application of the Eleventh Amendment to the present suit, there are additional and alternative reasons that would restrict the broad and general application of the Eleventh Amendment to admiralty proceedings as urged by the Division of Archives. The Division of Archives has the power to contract and, as testified by the Deputy Secretary of State, has the power to sue and be sued. If the Deputy Secretary of State is correct, this would arguably constitute a waiver of immunity to contract actions.

The State Constitution authorizes the legislature to waive sovereign immunity. Fla. Const. art 10 § 13. The legislature has waived immunity and specifically authorized suits to quiet

title where the state claims an interst or lien and the plaintiff seeks to execute or foreclose a lien. Section 69.041, Florida Statutes. A suit to quiet title and to establish and foreclose a salvage lien is such a suit. Since the Division of Archives has no title to the property in suit, its claim at most, is a lien arising under the contract. The Division of Archives then claims, under the contract of salvage, that it is entitled to the articles of salvage, since the contract was partially executed. But a contract does not vest title in and of itself. Under maritime law the most that a contract for salvage vests in the parties to a salvage contract is a maritime lien.

Further, the legislature has authorized suits to establish claims to

abandoned property. Chapters 716 and 717, Florida Statutes. Sections 716.07 and 717.22 specifically authorize suits to establish claims to abandoned property. This authorization is not limited to the state courts, but even if it were, such a limitation would be void and an intrusion by the State into an exclusive Federal domain, i.e., admiralty, where the claim is based upon the general maritime law.

The Division of Archives claims title under Section 267.061, Florida Statutes, purporting to vest title in the Department of Archives. This section is inapplicable because this Court and the Fifth Circuit already established that the property in question was found outside the territorial boundaries of the State and not on State sovereign lands.

See Treasure Salvors v. Unidentified Wrecked, etc., 569 F.2d 330, 333 (C.A.5th 1978) Hence, any claims the State has must of necessity fall under Chapter 716 or 717, Florida Statutes.

The State could not create a state court remedy that would apply to the pure admiralty right to award salvage service:

> The admiralty courts have exclusive jurisdiction in cases of salvage . . . based on the elements of a salvage service . . . common law courts can assess damages based upon contract, but cannot make a salvage award in the nature of a bounty for meritorious service rendered and to encourage others to do likewise. Norris, The Law of Salvage §14 (1958).

Hence, the administrative claim provisions of Chapters 716 and 717 are inoperative in this purely maritime case and this Court has jurisdiction to proceed to

adjudicate title to the property now in the hands of the substitute custodian though the effect will be to adjudicate the claim the Division of Archives has made to the property. This Court finds the Division of Archives has no title, the inchoate lien under the salvage contract is abrogated, and Treasure Salvors' title, as originally adjudicated, is confirmed.

In addition, this is not a suit to recover a money judgment from the State prohibited by Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974) and Ford Motor Company v. Department of Treasury, 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389 (1945). Instead, Treasure Salvors here seeks to recover a portion of the property they own by virtue of discovery and possession on the Outer

Continental Shelf. If the Division of Archives were allowed to retain this property, its officials would be acting outside the scope of their authority under state law since the state statutes under which they claim do not apply outside the State's territory. The rationale of Home Tel. & Tel. v. Los Angeles, 227 U.S. 278, 33 S.Ct. 312, 57 L.Ed. 510 (1913), prohibits this result since to allow such action would be to deprive Treasure Salvors of their property without due process in violation of the Fourteenth Amendment to the Constitution of the United States.

The State of Florida by engaging in a salvage operation outside of state boundaries, and outside the boundaries of the United States of America, in an exclusive area of maritime jurisdiction,

submitted any claims that it might have to the jurisdiction of this admiralty court, a court of exclusive jurisdiction in in rem admiralty proceedings. This action constituted a further waiver of sovereign immunity within the holding of Parden v. Terminal Railway of Alabama State Docks Department, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964). While Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389 (1945), may seem to limit Parden, the rationale of those cases does not apply here. First, as previously noted, this is not a suit to recover a money judgment from the state but rather an ancillary action by Treasure Salvors to bring within the jurisdiction of the court property

adjudicated to be its property as against the United States and others in privity with it. Second, the limit mentioned in Fitzpatrick v. Bitzer, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976), does not apply here because there is no need for the "threshhold fact of congressional authorization" to allow the plaintiff in this action to bring a suit in reference to a state's maritime activity in international waters. The Constitution of the United States, Art. 3, Sec. 2, has been interpreted to include a grant to the courts to declare the general maritime law and to supplement it -- a true legislative role. Hence, there is judicial authorization of a legislative nature giving express authorization to Treasure Salvors and others similarly situated to assert a

maritime claim just as explicit as the legislative grant in Parden.

For these reasons, and principally in reference to the discussion of Gardner v. State of New Jersey, 329 U.S. 565, 67 S.Ct. 467, 91 L.Ed. 504 (1947); In re State of New York (Queen City), 256 U.S. 503, 41 S.Ct. 592, 65 L.Ed. 1063 (1921); In re Muir, 254 U.S. 522, 41 S.Ct. 185, 65 L.Ed. 383 (1921); and State Road Department of Florida v. Tharp, 145 Fla. 745, 1 So. 2d 868 (1949), this Court holds that neither the Eleventh Amendment nor sovereign immunity deprive this Court of jurisdiction in its present proceedings.

DONE and ORDERED at Miami, Florida, this 21st day of August, 1978.

s/William O. Mehrtens
Senior United States
District Judge

ARTICLE III

SECTION 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more States; between a State and citizens of another State;-- between citizens of different States;-- between citizens of the same State claiming lands under grants of different States, and between a

State, or the citizens thereof, and foreign States, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

CHAPTER 267
ARCHIVES, HISTORY, AND RECORDS MANAGEMENT

267.011 Short Title.

267.021 Definitions.

267.031 Division of Archives, History, and Records Management.

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267.051 Bureau of Archives and Records Management.

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267.0615 Historic Preservation Project Review Council; creation; members; membership; powers and duties.

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267.081 Bureau of Publications.

267.09 Certain powers and duties transferred.

267.10 Legislative intent.

267.11 Designating archaeological sites.

267.12 Research permits; procedure.

267.13 Prohibited practices; penalties.

267.14 Legislative intent.

267.011 Short title. --This act shall be known as the "Florida Archives and History Act."

History. --s. 1, ch.67-50.

267.021 Definitions. --For the purpose of this act:

(1) "Division" shall mean the Division of Archives, History, and Records Management of the Department of State.

(2) "Public record" or "public records" shall mean all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, or other material regardless of physical form or characteristics made or received pursuant to law or ordinance or in connection with the transaction of officiasl business by any agency.

(3) "Agency" shall mean any state, county, or municipal officer, department, division, board, bureau, commission, or other separate unit of government

created or established by law.

(4) "Florida State Archives" shall mean an establishment maintained by the division for the preservation of those public records and other papers that have been determined by the division to have sufficient historical or other value to warrant their continued preservation by the state and have been accepted by the division for deposit in its custody.

(5) "Records center" shall mean an establishment maintained by the division primarily for the storage, processing, servicing, and security of public records that must be retained for varying periods of time but need not be retained in an agency's office equipment or space.

(6) "Historic sites and properties" shall mean real or personal property of historical value.

History. --s. 2, ch. 67-50; ss. 10, 35, ch. 69-106; s. 72, ch. 71-377.

267.031 Division of Archives, History, and Records Management. --

(1) The Division of Achives, History, and Records Management shall be organized into as many bureaus as deemed necessary by the division for the proper discharge of its duties and responsibilities under this chapter; provided, however, that in addition to the office of the director, there shall be at least four bureaus to be named as follows:

(a) Archives and records management.

(b) Historic sites and properties.

(c) Historical museums.

(d) Publications.

(2)(a) The Secretary of State is

hereby authorized to appoint advisory councils to provide professional and technical assistance to the division. The councils shall consist of not less than five nor more than nine members, and such appointments shall consist of persons who are qualified by training and experience and possessed of proven interest in the specific area of responsibility and endeavor involved.

(b) The chairman of each of said councils shall be elected by a majority of the members of the council and shall serve for 2 years. If a vacancy occurs in the office of chairman before the expiration of his term, a chairman shall be elected by a majority of the members of the council to serve the unexpired term of such vacated office.

(c) It shall be the duty of any of

the advisory councils appointed hereunder to provide professional and technical assistance to the division as to all matters pertaining to the duties and responsibilities of the division in the administration of the provisions of this chapter. Members of the councils shall serve without pay, but shall be entitled to reimbursement for their necessary travel expenses incurred in carrying out their official duties, as provided by s. 112.061.

(3) The division may employ a director of the division and shall establish his qualifications. The director shall act as the agent of the division in coordinating, directing, and administering the activities and responsibilities of the division. The director may also serve as the chief of

any of the bureaus herein created. The division may employ other employees as deemed necessary for the performance of its duties under this chapter.

(4) The division shall adopt such rules and regulations deemed necessary to carry out its duties and responsibilities under this chapter, which rules shall be binding on all agencies and persons affected thereby. The willful violation of any of the rules and regulations adopted by the division shall constitute a misdemeanor.

(5) The division may make and enter into all contracts and agreements with other agencies, organizations, associations, corporations and individuals, or federal agencies as it may determine are necessary, expedient, or incidental to the performanmce of its

duties or the execution of its powers under this chapter.

(6) The division may accept gifts, grants, bequests, loans and endowments for purposes not inconsistent with its responsibilities under this chapter.,

(7) All law enforcement agencies and offices are hereby authorized and directed to assist the division in carrying out its duties under this chapter.

History. --s.3, ch. 67-50; ss. 10, 25, 27, 35, ch. 69-106; s. 73, ch. 71-377; s.1, ch. 73-280; s. 4, ch. 78-323.

267.041 Office of the director. --

(1) It shall be the duty and responsibility of the office of the director to render all services required by the division and the several bureaus

herein set forth that can advantageously and effectively be centralized. The office shall perform such other functions and duties as the division may direct.

(2) The director shall supervise, direct, and coordinate the activities of the division and its bureaus.

History. --s.4, ch.67-50; ss. 10, 35, ch. 69-106.

267.051 Bureau of Archives and Records Management. --

(1) It shall be the duty and responsibility of the Bureau of Archives and Records Management to:

(a) Administer on behalf of the division the provisions of this section.

(b) Organize and administer the Florida State Archives.

(c) Preserve and administer such records as shall be transferred to its

custody, and to accept, arrange, and preserve them, according to approved archival practices and to permit them at reasonable times and under the supervision of the division to be inspected, examined and copied; provided that any record placed in the keeping of the division under special terms or conditions restricting their use shall be made accessible only in accordance with such terms and conditions.

(d) Cooperate with an assist insofar as practicable state institutions, departments, agencies, the counties, municipalities and individuals engaged in activities in the field of state archives, manuscripts, and history, and to accept from any person any papers, books, records and similar materials which in the judgment of the division

warrant preservation in the state archives.

(e) Provide a public research room where, under policies established by the division, the materials in the state archives may be studied.

(f) Conduct, promote, and encourage research in Florida history, government, and culture, and to maintain a program of information, assistance, coordination, and guidance for public officials, educational institutions, libraries, the scholarly community, and the general public engaged in such research.

(g) Cooperate with and, insofar as practicable, assist agencies, libraries, institutions, and individuals in projects designed to preserve original source materials relating to Florida history, government, and culture, and to prepare

and publish, in cooperation with the Bureau of Publications, handbooks, guides, indexes, and other literature directed toward encouraging the preservation and use of the state's documentary resources.

(h) Establish and administer a records management program, including the operation of a record center or centers directed to the application of efficient and economical management methods relating to the creation, utilization, maintenance, retention, preservation and disposal of records.

(i) Analyze, develop, establish, and coordinate standards, procedures and techniques of record-making and record-keeping.

(j) Insure the maintenance and security of records which are deemed

appropriate for preservation.

(k) Establish safeguards against unauthorized or unlawful removal or loss of records.

(l) Initiate appropriate action to recover records removed unlawfully or without authorization.

(m) Institute and maintain a training and information program in all phases of archives and records management to bring to the attention of all agencies approved and current practices, methods, procedures and devices for the efficient and economical management of records.

(n) Provide a centralized program of microfilming for the benefit of all agencies.

(o) Make continuous surveys of record-keeping operations.

(p) Recommend improvements in

current record management practices, including the use of space, equipment, supplies and personnel in creating, maintaining and servicing records.

(q) Establish and maintain a program in cooperation with each agency for the selection and preservation of records considered essential to the operation of government and to the protection of the rights and privileges of citizens.

(r) Make, or to have made, preservation duplicates, or designate existing copies as preservation duplicates, to be preserved in the place and manner of safekeeping as prescribed by the division.

(2) Any agency is hereby authorized and empowered to turn over to the division any record no longer in current

official use and the division, in its discretion, is authorized to accept such records and having done so shall provide for their administration and preservation as herein provided and upon acceptance shall be considered the legal custodian of such records.

(3)(a) All records transferred to the division may be held by it in a records center, to be designated by it, for such time as in its judgment retention therein is deemed necessary. At such time as it be established by the division, said records as are determined by it as having historical or other value warranting continued preservation shall be transferred to the Florida State Archives.

(b) Title to any record detained in any record center shall remain in the

agency transferring such record to the division.

(c) Title to any record transferred to the state archives, as authorized in this chapter, shall be vested in the division.

(4) The division may make certified copies under seal of any records transferred to it upon the application to any person, and said certificates, signed by the director, shall have the same force and effect as if made by the agency from which the records were received. The division may charge a reasonable fee for this service.

(5) Any preservation duplicate of any record made pursuant to this chapter shall have the same force and effect for all purposes as the original record. A transcript, exemplification, or certified

copy of such preservation duplicate shall be deemed, for all purposes, to be a transcript, exemplification or certified copy of the original record.

(6) It shall be the duty of each agency to:

(a) Cooperate with the division in complying with the provisions of this chapter.

(b) Establish and maintain an active and continuing program for the economical and efficient management of records.

(7) Each agency shall submit to the division in accordance with the rules and regulations of the division a list or schedule of records in its custody that are not needed in the transaction of current business and that do not have sufficient administrative, legal or

fiscal significance to warrant further retention by the agency. Such records shall, in the discretion of the division, be trasnsferred to it for further retention and preservation, as herein provided, or may be destroyed upon its approval.

(8) No records shall be destroyed or disposed of by any agency unless approval of the division is first obtained. The division shall adopt reasonable rules and regulations not inconsistent with this chapter which shall be binding on all agencies relating to the destruction and disposal of records. Such rules and regulations shall provide but not be limited to:

(a) Procedures for complying and submitting to the division lists and

schedules of records proposed for disposal.

(b) Procedures for the physical destruction or other disposal of records.

(c) Standards for the reproduction of records for security or with a view to the disposal of the original record.

(9) The division may employ a chief of the Bureau of Archives and Records Management. The chief shall possess such qualifications as the division may prescribe but shall be qualified by experience and training to administer the functions of the bureau and he shall serve at the pleasure of the division. It shall be the duty of the chief, under the general administration of the director, to supervise, direct, and coordinate the activities of the Bureau of Archives and Records Management.

History. --s. 5, ch. 67-50; ss. 10, 35, ch. 69-106.

267.061 Bureau of Historic Sites and Properties; state policy, responsibilities. --

(1) State policy relative to historic sites and properties:

(a) It is hereby declared to be the public policy of the state to protect and preserve historic sites and properties, buildings, artifacts, treasure trove, and objects of antiquity which have scientific or historical value or are of interest to the public, including, but not limited to monuments, memorials, fossil deposits, Indian habitations, ceremonial sites, abandoned settlements, caves, sunken or abandoned ships, historical sites and properties and buildings or objects, or any part thereof relating to

the history, government and culture of the state.

(b) It is further declared to be the public policy of the state that all treasure trove, artifacts and such objects having intrinsic or historical and archaeological value which have been abandoned on state-owned lands or state-owned sovereignty submerged lands shall belong to the state with the title thereto vested in the Division of Archives, History, and Records Management of the Department of State for the purpose of administration and protection.

(2) It shall be the responsibility of the Bureau of Historic Sites and Properties to:

(a) Locate, acquire, protect, preserve, and promote the location, acquisition, and preservation of historic sites

and properties, buildings, artifacts, treasure trove, and objects of antiquity which have scientific or historical value or are of interest to the public, including, but not limited to, monuments, memorials, fossil deposits, Indian habitations, ceremonial sites, abandoned settlements, caves, sunken or abandoned ships, or any part thereof.

(b) Develop a comprehensive statewide historic preservation plan.

(c) Encourage and promote the acquisition, preservation, restoration and operation of historic sites and properties by other agencies so that such property may be utilized to foster and promote appreciation of Florida history; provided, however, that no acquisition, preservation, restoration, or operation of such sites shall be made by the state

and no contribution shall be paid from state funds for such purposes until:

1. A report and recommendation of the advisory council has been received and considered by the division.

2. The division has determined that there exists historical authencity and a feasible means of providing for the acquisition, preservation, restoration, or operation of such property.

3. The property shall have been approved for such purpose by the division.

(d) Cooperate and coordinate with the Division of Recreation and Parks of the Department of Natural Resources in the operation and management of historic sites and properties subject to the Division of Archives, History, and Records Management.

(3) The division shall employ a state archaeologist, and such other archaeologists as deemed necessary, who shall possess such qualifications as the division may prescribe. The state archaeologist shall be assigned to the Bureau of Historic Sites and Properties and shall serve at the pleasure of the division. The state archaeologist, with emphasis on salvage archaeology, shall conduct an archaeological survey of the state and shall perform such other duties as the chief of the Bureau of Historic Sites and Properties may prescribe.

(4) The division may employ a chief of the Bureau of Historic Sites and Properties. The chief shall possess such qualifications as the division may prescribe but shall be qualified by experience and training to administer the

functions of the bureau and he shall serve at the pleasure of the division. It shall be the duty of the chief, under the general administration of the director, to supervise, direct, and coordinate the activities of the Bureau of Historic Sites and Properties.

History. --s.6, ch. 67-50; ss. 10, 25, 35, ch. 69--106.

267.0615 Historic Preservation Project Review Council; creation; members; membership; powers and duties. --

(1) There is hereby created within the Division of Archives, History, and Records Management the Historic Preservation Project Review Council. The council shall consist of the State Historic Preservation Officer, designated pursuant to Pub. L. No. 89-655, and six additional members to be appointed by the Governor

not later than 60 days after July 1, 1978. Initial appointments shall be for terms as follows: One for 2 years; two for 3 years; and three for 4 years. Thereafter, members shall be appointed for 4-year terms, except for appointments for unexpired terms, in which event the appointment shall be for the unexpired term only. Members may be reappointed. Council members shall be qualified through the demonstration of special interest, experience, or education in historic preservation. At least three members shall possess professional educational credentials representing one or more of the following disciplines: Archaeology, architecture, architectural history, history, or urban planning. A chairman shall be elected by the council's members. The director of the

Division of Archives, History, and Records Management of the Department of State, or his designee, shall serve without voting rights as secretary of the council; and it shall be his responsibility to provide staff assistance to the council. All action taken by the council shall be by majority vote.

(2) It shall be the responsibility of the council to evaluate all proposals for capital outlay involving projects requiring financial assistance from the state, relating to the preservation, restoration, reconstruction, or acquisition of any historical site; and, in making such evaluation, it shall apply, as a minimum standard, the following criteria:

(a) Benefit to the public.

(b) Historical significance.

(c) Site development plan.

(d) Economics.

(e) Maintenance.

(f) Need.

(g) Compatibility with the statewide historic preservation plan. The council shall prepare a report and make recommendations reflecting such evaluation. The report and recommendations of the council shall be filed with the President of the Senate, the Speaker of the House of Representatives, the chairmen of the appropriations committees of both houses of the Legislature, the Secretary of State, and the division. No capital outlay projects shall be eligible for state financial assistance until the council's report and recommendations have been filed with the Division of Archives, History, and Records Management and have received the affirmative recommendation

of the Secretary of State.

(3) The council shall develop and recommend to the Division of Archives, History, and Records Management appropriate rules and regulations relating to the performance of the duties and responsibilities of the council as provided in this act. Upon the adoption of said rules and regulations by the Department of State, the same shall govern the activities of the council. Said rules and regulations shall include, but not be limited to, rules and regulations relating to the following:

(a) The preparation and submission of proposals relating to historic preservation, restoration, recontruction, or acquisition and their evaluation by the council.

(b) Contributions by federal,

state, or local governments and private sources, except that no more than 50 percent of the nonfederal funds for any one capital outlay project shall be funded from state sources. In determining levels of nonstate funding for purposes of this chapter, "funds" may be construed to include the fair market value of real property donated from any source to any bona fide historic preservation board of trustees established under chapter 266.

(c) The preparation and submission of proposals relating to the creation of historic preservation boards of trustees and their evaluation by the council.

(4) It shall further be the responsibility of the council to monitor and evaluate all proposals for state historic preservation boards of trustees

created after July 1, 1976; and, in m,aking such evaluation, the council shall apply, as a minimum standard, the following criteria:

(a) Geographic jurisdiction.--The proposal shall specify geographic boundaries for the jurisdiction of the proposed board. The boundaries shall include at least one Historic Preservation District designated as such on the National Register of Historic Places.

(b) Membership.--The proposal shall specify that no less than one-third of the membership of the board shall possess professional educational credentials representing one or more of the following disciplines: History, architecture, architectural history, urban planning or archaeology.

(c) Architectural review board.--The proposal shall provide evidence in the form of an ordinance or resolution that the local governing body shall empanel and empower an architectural review board as defined by the statutes covering state historic preservation boards of trustees previously created under chapter 266.

(d) Responsibilities and duties; survey, inventory, and preliminary preservation plan.--The proposal shall specify that it shall be the responsibility and duty of the proposed board to perform, as a minimum, the following tasks:

1. To locate and identify through research all historic districts, sites, buildings, structures, and objects of

historical significance, as determined by evaluative criteria of the division, that are contained in the geographic jurisdiction of the board. Within 2 years of the first operational funding of the board, it shall be the duty of the board to have completed a professionally conducted intensive survey and inventory of all historic, architectural, and archaeological sites contained in the geographic jurisdiction of the board. Said survey and inventory shall not be considered complete until it is reviewed and approved by the division.

2. To develop a preliminary historic preservation plan for the area contained in the geographic jurisdiction of the board. Within 6 months of the approval of the survey and inventory by the division, the board shall develop a

preliminary historic preservation plan to be submitted to the division for review and approval.

(e) Economics.--The proposal shall provide evidence in the form of an ordinance or resolution that the local governing body shall participate in the operational funding of the porposed board. The proposal shall specify the annual operating budget of the board and how it shall be funded.

(f) Additional criteria.--

1. Benefit to the public.

2. Need.

3. Compatibility with the comprehensive statewide historic preservation plan as provided for in s. 267.061(2)(b).

History. --s. 1, ch. 73-279; s. 1, ch. 76--93; s. 4, ch. 78-323; s. 1, ch.

78-357.

267.0616 Submission of proposls for state historical preservation boards of trustees required; procedure. --

(1) Any person seeking the creation of a state historic preservation board of trustees shall submit the proposal to the division for review by the Historic Preservation Project Review Council as provided in s. 267.0615(4).

(2) The council shall submit each proposal it receives, together with a report and recommendation by the council regarding such proposal, to the President of the Senate, the Speaker of the House of Representatives, the chairmen of the appropriations committees of both houses of the Legislature, the Secretary of State, and the division.

History. --s. 2, ch. 76-93; s. 2,

ch. 78-357.

267.0617 Historic Preservation Trust Fund. --

(1) There is hereby created within the Division of Archives, History, and Records Management of the Department of State the Historic Preservation Trust Fund, which shall consist of moneys appropriated by the Legislature, moneys deposited pursuant to s. 550.037(2), and moneys contributed to the fund from any other source. The fund shall be administered by the Department of State through the Division of Archives, History, and Records Management for the purpose of this section.

(2) The division is authorized to conduct and carry out a program of grants-in-aid for historic preservation projects that meet the criteria of s.

267.0615(2) and (4) to any department or agency of the state; any unit of county, municipal, or other local government; of any nonprofit corporation or organization meeting the requirements of chapter 617. All moneys received from any source as appropriations, deposits, or contributions to this program shall be paid and credited to the Historic Preservation Trust Fund.

History. --s. 3, ch. 78-357.

267.062 Naming of state buildings and other facilities. --

(1) Except as specifically provided by law, no state building, road, bridge, park, recreational complex, or other similar facility shall be named for any living person.

(2) The Division of Archives, History, and Records Management of the

Department of State shall, after consulting with appropriate citizens' committees, recommend several persons whose contributions to the state have been of such significance that the division may recommend that state buildings and facilities be named for them.

History. --ss. 1, 2, ch. 71-267.

267.071 Bureau of Historical Museums. --

(1) It shall be the duty of the Bureau of Historical Museums to:

(a) Promote and encourage throughout the state knowledge and appreciation of Florida history by encouraging the people of the state to engage in the preservation and care of artifacts, museum items, treasure trove, and other historical properties; the

display and interpretation of historical materials; the marking and preservation of historical or archaeological buildings and sites; the teaching of Florida history in the schools; the conduct and presentation of historical celebrations and dramas; the publicizing of the state's history through media of public information; and other activities in historical and allied fields.

(b) Encourage, promote, maintain, and operate historical museums, including but not limited to mobile museums, junior museums and an historical museum in the state capital.

(c) Organize and administer a junior historian program in cooperation with the Department of Education and other agencies, organizations, historical commissions and associations,

corporations, and individuals, that may be concerned therein.

(2) The Division of Archives, History, and Records Management may employ a chief of the Bureau of Historical Museums. The chief shall possess such qualifications as the division may prescribe but shall be qualified by experience and training to administer the functions of the bureau and he shall serve at the pleasure of the division. It shall be the duty of the chief, under the general administration of the director, to supervise, direct, and coordinate the activities of the Bureau of Historical Museums.

History. --s. 7, ch. 67-50; ss. 10, 35, ch. 69-106.

267.081 Bureau of Publications. --

(1) It shall be the duty of the

Bureau of Publications to:

(a) Promote and encourage the writing of Florida history.

(b) Collect, edit, publish, and print pamphlets, papers, manuscripts, documents, books, monographs, and other materials relating to Florida history, archives, and records management. The Bureau of Publications may establish a reasonable charge for such publications not to exceed the cost of preparation of and publishing said publications.

(c) Cooperate with and coordinate research and publication activities of other agencies, organizations, historical commissions and societies, corporations, and individuals, which relate to archival and historical matters.

(2) The division may employ a chief of the Bureau of Publications. The chief

shall possess such qualifications as the division may prescribe but shall be qualified by experience and training to administer the functions of the bureau, and he shall serve at the pleasure of the division. It shall be the duty of the chief, under the general administration of the director, to supervise, direct, and coordinate the activities of the bureau of publications.

History. --s, 8, ch. 67-50; ss. 10, 35, ch. 69-106.

267.09 Certain powers and duties transferred. --

(1) All powers and duties heretofore set forth in chapter 257, pertaining to the State Library, insofar as they may relate to historical archives or public records as set forth in chapter 257, are hereby transferred to the

division to be administered pursuant to this law.

(2) All the powers and duties heretofore set forth in chapter 592 relating to the Division of Recreation and Parks of the Department of Natural Resources, insofar as they shall relate to historical memorials, shall be transferred to the division to be administered pursuant to this law.

History. --s. 9, ch. 67-50; ss. 10, 25, 35, ch. 69-106.

267.10 Legislative intent. --In enacting this law, the Legislature is cognizant of the fact that there a may be instances where an agency may be microfilming and desroying public records or performing other records management programs, pursuant to local or special acts; the Legislature is further aware

that it may not be possible to implement this chapter in its entirety immediately upon its enactment and it is not the legislative intent by this chapter to disrupt the orderly microfilming and destruction of public records pursuant to such local or special acts above referred to; provided, however, that such agencies make no further disposition of public records without approval of the Divison of Archives, History, and Records Management of the Department of State pursuant to such rules and regulations as it may establish.

History. --s. 11, ch. 67-50; ss. 10, 35, ch. 69-106.

267.11 Designating archaeological sites. --The Division of Archives, History, and Records Management may publicly designate an archaeological site of sig-

nificance to the scientific study or public representationn of the state's historical, prehistorical, or aboriginal past as a "state archaeological landmark." In addition, the division may publicly designate an interrelated grouping of significant archaeological sites as a "state archaeological landmark zone." However, no site or grouping of sites shall be so designated without the express written consent of the private owner thereof. Upon designation of an archaeological site, the owners and occupants of each designated state archaeological landmark or landmark zone shall be given written notification of such designation by the division. Once so designated, no person may conduct field investigation activities without first securing a permit from the division.

History. --s. 1, ch. 73-166.

267.12 Research permits; procedure. --

(1) The division may issue permits for excavation and surface reconnaissance on state lands or lands within the boundaries of designated state archaeological landmarks or landmark zones to institutions which the division shall deem to be properly qualified to conduct such activity, subject to such rules and regulations as the division may prescribe, provided such activity is undertaken by reputable museums, universities, colleges, or other historical, scientific, or educational institutions or societies that posess or will secure the archaeological expertise for the performance of systematic archaeological field research, comprehensive analysis,

and interpretation in the form of publishable reports and monographs, such reports to be submitted to the division.

(2) Those state institutions considered by the division permanently to possess the required archaeological expertise to conduct the archaeological activities allowed under the provisions of the permit may be designated as accredited institutions which will be allowed to conduct archaeological field activities on state-owned or controlled lands within the boundaries of any designated state archaeological landmark or any landmark zone without obtaining an individual permit for each projct, except that those accredited institutions will be required to give prior written notice of all anticipated archaeological field activities on state-owned or controlled

lands or within the boundaries of any designated state archaeological landmark or landmark zone to the division, together with such information as may reasonably be required by the division to insure the proper preservation, protection, and excavation of the archaeological resources. However, no archaeological activity may be commenced by the accredited institution until the division has determined that the planned project will be in conformity with the guidelines, regulations, and criteria adopted pursuant to ss. 267.11-267.14. Such determination will be made by the division and notification to the institution given within a period of 15 days from the time of receipt of the prior notification by the division.

(3) All specimens collected under a

permit issued by the division or under the procedures adopted for accredited institutions shall belong to the state with the title thereto vested in the Division of Archives, History, and Records Management of the Department of State for the purpose of administration and protection. The division may arrange for the disposition of the specimens so collected by accredited state institutions at those institutions and for the temporary or permanent loan of such specimens at permit-holding institutions for the purpose of further scientific study, interpretative displays, and curatorial responsibilities.

History. --s. 1, ch. 73-166.

267.13 Prohibited practices; penalties. --

(1) Any person who shall conduct field investigations on any land owned or controlled by the state or its departments or institutions or within the boundaries of any designated state archaeological landmark or landmark zone without first obtaining a permit or having first received from the division a notice to proceed under the procedures relating to accredited institutions, or any person who shall appropriate, deface, destroy, or otherwise alter any archaeological site or specimen located upon state lands or within the boundaries of a designated state archaeological landmark or landmark zone, except in the course of activities pursued under the authority of a permit or under procedures relating to accredited institutions granted by the division, shall be guilty

of a misdemeanor punishable by a fine not exceeding $500 or by imprisonment in the county jail for a period not to exceed 6 months or both, and in addition, shall forfeit to the state all specimens, objects, and materials collected or excavated, together with all photographs and records relating to such material.

(2) Any person who shall reproduce, retouch, rework, or forge any archaeological or historical object originating from an archaeological site as designated by ss. 267.11-267.14, and deriving its principal value from its antiquity, or make any such object, whether copies or not, or falsely label, describe, identify, or offer for sale or exchange any object, with intent to represent the same to be an original and genuine archaeological or historical

specimen, or any person who shall offer for sale or exchange any object with knowledge that it has previously been collected or excavated in violation of any of the terms of ss. 267.11-267.14 shall be guilty of a misdemeanor punishable by a fine not exceeding $500 or by imprisonment in the county jail for a period not to exceed 6 months or both.

History. --s. 1, ch. 73-166.

267.14 Legislative intent. --It is the declared intention of the Legislature that field investigation activities on privately owned lands should be discouraged except in accordance with both the provisions and spirit of ss. 267.11-267.14; and persons having knowledge of the location of archaeological sites are encouraged to communicate such information to the

the Division of Archives, History, and Records Management.

History. --s. 1, ch. 73-166.

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NO. 80-1348

IN THE SUPREME COURT OF THE UNITED STATES
October Term 1980

STATE OF FLORIDA,
DEPARTMENT OF STATE,
Petitioner,

-vs-

TREASURE SALVORS, INC.,
ARMADA RESEARCH CORP.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JANUARY 13, 1981
CERTIORARI GRANTED MAY 18, 1981

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August 21, 1978	Final Judgement
August 25, 1978	State's Motion to Strike (and Supporting Memorandum)
September 14, 1978	State's Notice of Appeal
September 18, 1978	Order of Court of Appeals (staying judgement of District Court pending further Order, etc.)
May 10, 1979	Plaintiffs' Addendum to Description (of location of vessel)

December 11, 1979	Plaintiff's Amendment to Description (of location of vessel)
July 24, 1980	Panel Opinion of Court of Appeals
August 4, 1980	State's Suggestion for Rehearing en banc
October 16, 1980	Order of Court of Appeals Denying Petition for Rehearing en banc
October 24, 1980	Judgement and Issuance of Mandate by Court of Appeals
January 13, 1981	Petition for Writ of Certiorari filed
May 18, 1981	Petition for Writ of Certiorari granted

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
KEY WEST DIVISION

CASE NO. 75-1416

TREASURE SALVORS, INC., a corporation and ARMADA RESEARCH CORP., a corporation,

Plaintiffs,

COMPLAINT

vs.

THE UNIDENTIFIED WRECKED AND ABANDONED SAILING VESSEL, HER TACKLE, ARMAMENT, APPAREL AND CARGO LOCATED WITHIN 2500 YARDS OF A POINT AT COORDINATES 24° 31.5' NORTH LATITUDE AND 82° 20' WEST LONGITUDE, SAID SAILING VESSEL IS BELIEVED TO BE THE "NUESTRA SENORA DE ATOCHA",

Defendant.

JURISDICTION

This is a case of admiralty and maritime jurisdiction, as hereinafter more fully appears. This is an admiralty and maritime claim within the meaning of Rule 9(H).

1. Both Plaintiffs are corporations

organized and having offices and places of business in this division of the district of the State of Florida. Plaintiffs bring this action individually and as owners of the salvage vessels North-Wind, South-Wind and Virgalona and on behalf of all others beneficially interested.

2. The unidentified wrecked and abandoned sailing vessel located within 2500 yards of a point at coordinates 24° 31.5' north latitude and 82° 20' west longitude is thought to be the NUESTRA SENORA DE ATOCHA (hereinafter referred to as the ATOCHA). The vessel sank in or about the year of 1622 while in route from the Spanish Indes to Spain. The vessel has been wrecked and abandoned since that time. Her present position as set out above is outside the territorial

waters of the State of Florida and of the United States. The ATOCHA will be, however, within the jurisdiction of this honorable Court within the pendency of this action. In fact, some portions of the vessel have now been brought by the Plaintiffs within the jurisdiction of this honorable court.

3. Plaintiffs are the operators, owners, or charterers of salvage vessels presently in possession and exclusive control of the ATOCHA.

4. The remains of the ATOCHA, her armament, apparel, tackle and cargo are all abandoned treasure found, discovered, and confirmed by, and in total and exclusive joint possession of the Plaintiffs.

5. The Plaintiffs have engaged in long, extensive research since the year 1970 and have engaged in expensive and

dangerous search, exploration and salvage in order to find and possess the ATOCHA and other treasure mentioned above.

6. The services, skills and expenditures of time and money on the part of the Plaintiffs are of the highest order of merit.

7. By virtue of these acts title to the ATOCHA and other treasure has become vested in the Plaintiffs jointly in equal shares.

8. But if mistaken in this the services constitute salvage services of the highest order of merit justifying a full and liberal salvage award.

WHEREFORE, Plaintiffs demand:

1. That proper process issue in accordance with supplemental admiralty rules and that since it is impracticable for the Marshall to take full posession

that additional ancillary process issue under Rule E(4)(B) and C(5) as the court may order and that in the event bond is not posted that Public Notice to claimants be given in such form as the court may direct.

2. That Plaintiffs be put into possession of the ATOCHA and other property and that all other persons, firms, and corporations or government agencies be enjoined from interferring with Plaintiffs title, possession, and property.

3. That Plaintiffs title be confirmed against all claimants and all the world.

4. Alternatively, that Plaintiffs be awarded a full and liberal salvage award of the highest order.

5. And Plaintiffs pray for general relief and as in duty bound will ever pray, ets.

Respectfully submitted,

s/ David Paul Horan
DAVID PAUL HORAN, ESQ.
517 Whitehead Street
Key West, Florida 33040
and J. M. MORSE III, of
COUNSEL
Attorneys for the Plaintiffs

(Verification omitted in printing)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

(Title omitted in printing)

MOTION FOR ORDER COMMANDING UNITED STATES MARSHAL TO ARREST AND TAKE CUSTODY OF THOSE PORTIONS OF THE DEFENDANT VESSEL NOW BEING HELD BY L. ROSS MORRELL OR JAMES McBETH OR UNDER THEIR CUSTODY, CARE OR CONTROL

COME NOW the Plaintiffs, by and through their undersigned attorney, and pursuant to the Final Judgment rendered by this Court February 19, 1976 and the Appellate Opinion rendered by the United States Court of Appeals for the Fifth Circuit No. 76-2151, March 13, 1978, move this Court for an Order commanding the United States Marshal to arrest and take custody of those portions of the Plaintiffs' vessel now being held by L. Ross Morrell or James McBeth or being held under their custody, care or control. This Motion is made by the Substitute

Custodian, Treasure Salvors, Inc. and Armada Research Corporation. The grounds cited for this Motion are as follows:

1. On October 28, 1975, this Court appointed the Plaintiffs, Treasure Salvors, Inc. and Armada Research Corporation, the substitute custodian of the vessel which was the subject of this action. The Court in its Order turned over:

> ". . . possession of the Defendant vessel, her tackle, apparel, armament and cargo and all other necessaries thereunto appertaining and belong to said vessel to said substitute custodian. . ."

2. The substitute custodian/Plaintiffs were awarded a Summary Judgment by this Court on February 2, 1976, and on February 19, 1976, this Court issued an Order of Final Judgment confirming the substitute custodian/Plaintiffs as having

sole title and right to possession of the Defendant vessel.

3. The Defendant/Intervenor, United States of America, on the 24th of February, 1976, moved this Court for an Order, pending appeal, continuing the substitute custodianship of the Plaintiffs. On February 27, 1976, this Court granted the Motion.

4. Fifty-seven (57) days after the Final Judgment, the United States of America, Defendant/Intervenor herein, appealed to the United States Fifth Circuit Court of Appeals.

5. On November 15, 1977 oral arguments were heard in the appeal filed by the United States, Defendant/Intervenor/Appellant, and on March 13, 1978 the Fifth Circuit Court of Appeals rendered its decision. The Fifth Circuit in its

decision pointed out that the decision in United States v. Florida, 420 U.S. 531, 95 S.Ct. 1162, 43 L.Ed.2d 375 [1975], refuted Florida's claim to the wreck site. The Opinion conclusively shows that it is undisputed the wreck lies on the continental shelf outside the territorial waters of the United States.

6. The Plaintiffs' claims were adequately noticed and all interested parties, including the State of Florida, were constructively served by Notice pursuant to the Admiralty Rules regarding the above-captioned in rem action.

7. During the period of the appeal the Defendant, United States, allowed by Stipulation the release of certain objects and artifacts from the substitute custodianship of the Plaintiffs/Appellees. The release of the items and

objects provided a method of raising funds which were needed to continue the corporate existence of the Plaintiffs.

8. The present status of the substitute custodianship presently in force within this Court's jurisdiction is that numerous items and objects which were recovered from the wreck of the NUESTRA SENORA DE ATOCHA" by the Plaintiffs and which should be in substitute custodianship and subject to distribution pursuant to this Court's Final Judgment and the Appellate Court's Opinion, are presently being held by Mr. L. Ross Morrell, the Director of the Division of Archives, History and Records Management, Bureau of Historic Sites and Properties, Florida Department of State, or in the alternative Mr. James McBeth, the Bureau Chief of the Historical Museum, Division of

Archives, History and Records Management, Bureau of Historic Sites and Properites, Florida Department of State. These items are not in substitute custodianship, nor have they been arrested by the United States Marshal, although the items and objects were recovered from the ATOCHA wreck.

9. A list of the items and objects in Tallahassee, Florida is attached hereto and made a part hereof and the said L. Ross Morrell and/or James McBeth continue to retain possession of the items and objects under a contract dated December 3, 1974. A copy of said contract is attached hereto and made a part hereof.

10. The consideration between the parties to the attached contract is set out in the document as follows:

"The Division hereby grants unto the salvager a contract to conduct underwater salvage from and upon certain submerged sovereignty lands of and belonging to the State of Florida for and in consideration of the amount of Twelve Hundred and No/100 - ($1,200.00) Dollars. . ." [emphasis addded]

11. At the time of the contract dated December 3, 1974, the Supreme Court of the United States had not ruled on the issue of Florida's boundaries and the State of Florida was claiming complete ownership and sovereignty over the submerged lands encompassing the wreck site of the ATOCHA.

12. Since the Supreme Court ruled and despite numerous demands being made, and despite this Court's adjudication of title, said L. Ross Morrell and/or James McBeth still refuse to give up possession to this Court's substitute custodian of

the objects and items they are presently holding.

13. Inasmuch as the State of Florida and said L. Ross Morrell and James McBeth were privy to this litigation, it is clear that this Court confirmed to the Plaintiffs:

> ". . .title to and right to immediate and sole possession of the vessel identified in this matter as "NUESTRA SENORA DE ATOCHA", together with all her tackle, armament, apparel, and cargo, wherever the same may be found." [emphasis supplied]

14. This Court retained jurisdiction of this matter for the purposes of enforcement of its Order.

WHEREFORE, The substitute custodian/Plaintiffs/Appellees, move this Court for the issuance of a warrant for the arrest in rem made out to the Marshall of the United States for the Southern District

of Florida. It is respectfuly requested that this Court direct said Marshal to take into his possession and custody those portions of said vessel now in the possession, custody, care or control of said L. Ross Morrell and/or James McBeth, and then upon the return to the Southern District, to surrender said possession to the Court's duly appointed substitute custodian.

Respectfully submitted,

s/ David Paul Horan
DAVID PAUL HORAN
513 Whitehead Street
Key West, Florida 33040

Counsel for the substitute custodian/Plaintiffs/Appellees

(Certificate of Service omitted in printing)

[EXHIBIT]

SALVAGE CONTRACT
between
DIVISION OF ARCHIVES, HISTORY AND
RECORDS MANAGEMENT
DEPARTMENT OF STATE
STATE OF FLORIDA
and
ARMADA RESEARCH COMPANY, INCORPORATED

No. S-8-C

THIS CONTRACT made this 3rd day of December, 1974, between the DIVISION OF ARCHIVES, HISTORY AND RECORDS MANAGEMENT, DEPARTMENT OF STATE, STATE OF FLORIDA, hereinafter called the DIVISION, and ARMADA RESEARCH COMPANY, INCORPORATED, 100 Margaret Street, Key West, Florida 33040 hereinafter called the SALVAGER:

WITNESSETH:

I.

The Division hereby grants unto the Salvager a contract to conduct underwater salvage from and upon certain submerged sovereignty lands of and belonging to the

State of Florida for and in consideration of the amount of Twelve Hundred Dollars ($1,200.00) and the Salvager's faithful performance of the covenants and conditions as set forth in Parts II and III hereof, which contract is made under authority of Chapter 267, Florida Statutes, and Chapter 1A-31, Florida Administrative Code, for that property more particularly described as follows:

> Commence below the center of the aid to Navigation located at 24° (degrees) 27.5' (minutes) North latitude, and 82° (degrees) 11.1' (minutes) West longitude, identified on United States Coast and Geodetic Survey Chart #1252, 9th Edition, dated June 27, 1970, as Cosgrove Shoal Light (Fl. 6 Sec. 49 Ft. 10M.) thence run on a bearing of 296.5° (degrees) (true) 19,500 (nineteen thousand five hundred) yards to the Point of Beginning. The Point of Beginning being the center of a circular area with a radius of 1250 (one thousand two hundred fifty) yards centered approximately at 24° (degrees)

31.85' (minutes) North latitude and 82° (degrees) 20.55' (minutes) West longitude. Said area intended to encompass shipwreck site 8 (Florida) Mo (Monroe) 141.

The above described area lying and being in Monroe County, Florida.

which area, represented to the best of the Salvager's knowledge to contain and encompass a shipwreck site, is to be worked for the purpose of salvaging abandoned vessels or the remains thereof including, but not limited to, relics, treasure trove and other materials related thereto and located thereupon and therein, which abandoned material is the property of the State of Florida.

II.

The Salvager agrees and covenants as follows:

2. To utilize only one vessel, approved in writing by the Division's

director, in the exploration and/or salvage operations conducted hereunder, from which any recovery operations contemplated under the terms of this contract will be carried out. This provision does not necessarily preclude the use of additional minor support vessels provided written request for permission to use support vessels is made to the director and written approval is given therefor and the Salvager agrees that no salvage and recovery diving will be made therefrom.

2. To make a quarterly written report, or more often if either party desires, of salvage operations to the Division, including an itemized list of materials recovered under this Agreement; and, to permit the Division or its designated agent to audit the books, accounts,

and logs of the Salvager in connection with operations permitted under this contract.

3. To retain possession and to safely maintain storage of all materials, whether of a precious or base nature, recovered hereunder unless and until explicitly relieved in writing of this obligation by either the Division's director or court order; provided, further, to keep the Division apprised at all times of the location of said material, and to maintain storage in a place designated in writing by Division director and in the manner prescribed by the Division's underwater archaeologist, and to grant the Division the right to the immediate possession of any and all such materials, including the right of inspection during normal business hours.

4. To make no disposition, by any method, of any material recovered hereunder until:

a. after the division of material recovered hereunder has been completed as provided in Article III, Number 2 hereinafter, and

b. after legal title to said material has been vested in the Salvager as a result of such division hereunder.

5. To hold harmless the Division and its agents for damage, loss or destruction of and to material recovered hereunder resulting from scientific examination, including cleaning thereof; nor shall such material adversely affect either party's part of the payment set forth in Article III, 2.

6. To extend all reasonable cooperation to any personnel of the

Division in the Salvager's performance hereunder;

7. To specify and acknowledge that salvage is being conducted under a contract with the Division in any and all information, whether verbal or written, given by the Salvager and his agents to the news media regarding activities hereunder; and, further to accurately represent and state his contractual relationship in any articles authorized by Salvager and his agents in whatever form, including but not limited to scientific reports, magazine stories, television and films and to submit for prior review by the Division articles authored by the Salvager or his agent; further, to refrain from attributing statements to personnel of the Division and to, whenever possible, have a member

of the Division present when being interviewed as to the historical import of the site and any materials recovered therefrom.

8. To make no assignments of any rights under this Agreement; provided, however, that written employment agreements may be approved by the Division director under Rule 1A-31.03, Florida Administrative Code; and, further, the Salvager may, subject to prior written approval by the Division, enter into agreements to lease equipment for salvage under this Agreement.

9. To comply with all laws and regulations of the United States and the State of Florida and its agencies relating to conservation of marine life, navigation, riparian rights, and preservation and protection of historic and archaeo-

logical sites as contemplated by the provisions of Chapter 267, Florida Statutes.

10. To disturb no beds of economically exploitable metals or minerals lying and being in their natural state.

11. To use no explosives in any of the operations under this Agreement.

12. To furnish to the Division a magnetometer survey chart of the Agreement area prior to the commencement of salvage operations hereunder.

13. To recover artifacts utilizing minimal horizontal controls of six-meter squares throughout the site's scatter area and minimal one meter squares within the site's concentration area(s); all squares must be an integral portion of the site's grid system; concentration areas are to be as defined by the

Division's underwater archaeologist.

14. To utilize upon the request of the Division's underwater archaeologist vertically controlled excavation and record keeping techniques specified by him.

15. To place no portion of the site in jeopardy through exposure to destructive agents, either natural or artificial upon cessation of salvage activities covered by this Agreement and to assist a visual inspection by the Division's underwater archaeologist at the termination of salvage activities to assure that this covenant is fulfilled.

16. To maintain a Record (Log) of Daily Activities, furnished by the Division, according to instructions therein, including the Salvager's submission of weekly reports therefrom to the Division;

the log is the property of the Division and is subject to inspection during the term of this Agreement and to disposition at the Division's discretion at the expiration hereof; provided, that upon the expiration of this Agreement, the weekly reports (blue copies) as submitted by the Salvager during the term hereof shall become the property of the Salvager and, upon request, the Division shall return said reports to the Salvager;

17. To permit the Division and its agents to inspect any of the Salvager's business records kept in regard to salvage operations conducted under this Agreement; and, to permit agents of the Division to board salvage and support vessels operated by the Salvager and to enter the waters at salvage sites in order to observe and audit salvage

operations conducted hereunder.

18. To furnish the Department a good and sufficient surety bond payable to the division in the amount of Fifteen Thousand Dollars ($15,000.00) to guarantee faithful and honest conduct by the Salvager of the covenants of this contract.

19. To permit, two (2) qualified field agents of the Division, which shall be assigned to oversee the salvage operations, to be on board the approved work vessel each time it leaves port to work the contract site. If only one State representative is available the salvager may furnish one additional person. The salvager may provide this additional person upon the condition that this person shall be assigned specifically to and work under the supervision of the field

agent representative, and that this person meets the State's current employment qualifications for a field agent.

20. To commission, at salvager's expense, a bonded oceanographic surveyor to locate with semi-permanent markers or buoys the center of the salvage site described above, before any work is performed in contract area.

III.

The following conditions are mutually agreed upon by the parties hereto:

1. This agreement shall be for a term of one (1) year from the date first above written, subject to written renewal by the parties hereto upon such terms and conditions as are mutually agreeable.

2. In payment for the Salvager's

satisfactory performance and compliance with this Agreement, the Division will award to the Salvager seventy-five percent (75%) of the total appraised value of all material recovered hereunder, which payment shall be made at the time division of such material is made by the parties hereto. Said payment may be made in either recovered material or fair market value, or in a combination of both, at the option of the Division's director. The time and location of the division shall be as mutually agreed upon by the parties hereto, which division shall be made as expeditiously as possible but not so quickly as to jeopardize scientific evaluation of the material deemed necessary by the Division. In the event that the parties hereto are unable to agree upon the value of material

recovered hereunder, the parties hereto shall each name a professional appraiser, and they a third, which three appraisers shall determine the value and proper division of the salvaged or recovered material to the Department and Salvager respectively. Payment for the appraisers' services shall be made jointly and equally by the parties hereto.

3. The State of Florida, acting by and through its departments and agencies, reserves the right to enter into agreements or leases covering the contract area described herein for whatever purpose, including the sale of oil, gas and hard minerals; oysters and oyster shells; sand, gravel or similar products, and to remove the same, provided such purposes shall not interfere with the salvage

operations of the Salvager herein; provided, however, any prior agreement made by the Trustees of the Internal Improvement Trust Fund shall prevail over this Agreement if any conflicts arise as between it and this Agreement.

4. Should the Division's salvage and exploration field agent, the Division's underwater archaeologist or other archaeologist assigned by the Division to the salvage site determine that artifacts or archaeological features discovered or uncovered during recovery operations under this contract are of sufficient scientific or historical importance to the public to warrant special handling or protection, the Division's representative may order temporary termination of the excavation or recovery operation over an area

delineated by him. Termination of operations will remain in effect until such time as the Division's underwater archaeologist determines whether to institute special operational procedures to properly and scientifically record and recover the artifacts or features or until he releases the artifacts and features to normal recovery procedures. This provision is solely intended to protect scientific and historic information relating to the wreck site and is not intended to preclude excavation or recovery operations by the salvager elsewhere on the site during the time the stop order is in effect so long as operations in other areas of the site in no way endanger the artifacts or features being protected.

5. The Division, acting through its

Underwater Archaeological Research Section, or its designee, reserves the right to enter upon the contract area herein described to survey for prehistoric and historic archaeological sites, including shipwrecks and objects of interest to it, in the furtherance of its responsibilities as set forth and contemplated by Chapter 267, Florida Statutes, when in its judgement such sites and objects are threatened with either destruction or disturbance by any type of activity, including, but not limited to, dredging and drilling operations; cable and pipeline installations or removals, and construction of seawalls, revetments, groins or submerged structures.

6. This Agreement may be immediately cancelled at the option of the Division should the Salvager fail to comply

with any of the provisions contained herein or any of the rules and regulations of the Division, or if Salvager terminates for whatever reason this contract without fulfilling the conditions listed above, the Salvager's performance bond shall be forfeited to the Division in the case of such non-compliance. In the case of termination of work by the Salvager, it is understood and agreed between the parties hereto there will be division between the Salvager and the Division of Archives, History and Records Management of any recovered artifactual material.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals in execution of this Agreement the day and year first above written.

WITNESSES:

s/ Barbara Stout

s/ Diane Corbett

s/ Margory Hargroves

s/ Bleth McHaley

s/ Margory Hargroves

s/ Bleth McHaley

s/ W. Robert Williams (Seal)
W. Robert Williams, Director
Division of Archives,
History and Records
Management
Department of State
State of Florida

s/ Melvin A. Fisher (Seal)
Melvin A. Fisher, President
Armada Research, Inc.

s/ Delores Fisher (Seal)
Delores Fisher, Secretary
Armada Research, Inc.

(Note: Remaining exhibit omitted in printing, but is contained in the Record at R330-340.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

(Title omitted in printing)

WARRANT FOR ARREST IN REM

THE PRESIDENT OF THE UNITED STATES OF AMERICA

TO: THE MARSHAL OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA

GREETING:

WHEREAS, on the 18th day of July, 1975, Treasure Salvors, Inc., a corporation and Armada Research Corporation, a corporation, filed a Complaint under Rule 9(h) against the Unidentified Wrecked and Abandoned Sailing Vessel, her tackle, armament, apparel and cargo located with 2500 yards of a at coordinates 24° 31.5' North Latitude and 82° 20' West Longitude, said sailing vessel believed to be the NUESTRA SENORA DE ATOCHA" for the reasons in said Complaint, and

WHEREAS, in November of 1975 Notice of said claim was published in a newspaper of general circulation within the District, and

WHEREAS, the State of Florida nor any of its agencies, agents, or employees, did appear in this cause to defend or prosecute any claim that they might have to any portions of said vessel that were in their possession, custody, care or control.

NOW, THEREFORE, you are hereby commanded to take into your possession the portions of said vessel which have been in the possession or are in the possession of L. Ross Morrell and/or James McBeth, or under their custody, care or control and to bring said portions of said vessel within the jurisdiction of this Honorable Court and transfer

possession of same to the substitute custodian appointed in this action.

And how you shall have executed this Writ, make known to this Court with your Certificate of Execution thereof written.

WITNESS THE HONORABLE WILLIAM O. MEHRTENS, Senior Judge of said Clerk at Miami, Florida in said District, this 6th day of April, 1978.

s/ W. Mehrtens

JOSPEH I. BOGART, CLERK, United States District Court, Southern District of Florida

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

(Title omitted in printing)

STATE OF FLORIDA'S MOTION TO QUASH WARRANT FOR ARREST IN REM

COMES NOW, the State of Florida, by and through the undersigned counsel, and moves this Court to set aside and quash the warrant for arrest in rem issued against the State of Florida at the request of Plaintiffs herein, upon the following grounds:

1. The State of Florida was not a party in the case of Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel in the Fifth Circuit Court of Appeals. Therefore, Florida did not waive the requirement that the res be present within the territorial jurisdiction of the Court and did not consent to the Court's jurisdiction to determine its

interest in the portion of the vessel in question.

2. Process cannot be properly issued pursuant to 28 U.S.C. Section 1692 when those to be affected were not parties to the underlying proceedings.

3. A contract was entered into between Armada Research Corporation and the State of Florida on December 3, 1974 and was for a good and valid consideration. The contract alone determined the rights and obligations of the contracting parties and was in no way affected by United States v. Florida. This contract was fully executed and performed prior to the United States v. Florida.

4. In affirming this Court's ruling in this proceeding, the Fifth Circuit "did not approve that portion of its order which may be construed as a holding

that plaintiff has exclusive title to and the right to immediate and full possession of the vessel and cargo as to other claimants ... who are not parties previous to this litigation."

5. From a legal and curatorial standpoint, it is imperative that Bureau Staffers photograph each of the 1,700 plus artifacts from the site and in the 8 M O 141 prior to relinquishing our possession of them. Due to the normal annual requirements of the on-going contract program the conservation laboratory personnel have been attending to and conserving and curating current contract materials. The clean and processed materials have yet to be photographed. It would be impossible to defend the agency against any subsequent contentions of miscounted, lost, misplaced, or "des-

troyed in cleaning", artifacts without a complete photographic inventory of that which will be relinquished. Furthermore, in the absence of such a photographic record, documented by bureau staffers, the continued authentic province of the collection cannot be attested to by Bureau Staffers.

6. Said warrant is too indefinite and uncertain with reference to artifacts in question, the same not being described other than by the use of the word "portion" and it not being shown what artifacts are contemplated, by the warrant.

WHEREFORE, THE STATE OF FLORIDA requests that the warrant for arrest In Rem be quashed and held void by this Court and that the State of Florida recover its costs and be given such other and further relief to which it may be

justly entitled by virtue of the premises.

Respectfully submitted,

ROBERT L. SHEVIN
Attorney General

s/ Joel D. Rosenblatt
JOEL D. ROSENBLATT
Assistant Attorney General
8585 Sunset Drive
Miami, Florida 33143

(Certificate of Service omitted in printing)

MEMORANDUM OF LAW IN SUPPORT OF STATE'S MOTION TO QUASH WARRANT FOR ARREST IN REM

The State of Florida's Motion to Quash Warrant for Arrest in Rem is based on several grounds:

1. The District Court clearly did not have jurisdiction over the State of Florida in order to enter an order asking the State's interest in the artifacts or vesel in question. At no time did

Florida enter an appearance in the Treasure Salvors, Inc. at the District Court level or in the Fifth Circuit Court of Appeal. The Fifth Circuit in its opinion in Treasure Salvors, Inc. v. The Unidentified Wreck and Abandoned Sailing Vessel, Case No. 76-2151 (USCA 5th Cir., 1978), recognize that jurisdiction of the res and consent to jurisdiction as being a basic prerequisite to the court having valid jurisdiction over the parties. Indeed, in response to the United States' agruments that the court lacked jurisdiction, the Court of Appeal opened as follows:

> "The United States intervened in plaintiffs in rem as a party defendant and filed a counter-claim asserting a property right. In the res. the government, by intervening in this case and by stipulating to the court's admiraly jurisdiction waive the usual

> requirement that the res. be present within the territorial jurisdiction of a court and consented to the court's jurisdiction to determine its interest in the extra territorial portion of the vessel."

Contrary, the Treasure Salvors, Inc. contract entered into by the State of Florida and Armada Research Corporation was fully executed and performed prior to the case relied upon by the plaintiff, United States v. Florida. It is recognized by the Court of Appeal that a mandate is to be interpreted reasonably and not in a manner to do injustice. If the State of Florida's motion is not granted, irreparable harm will be suffered by the State. Once custody of the artifacts in question is relinquished by the State, without the same having been photographed by bureau staffers, it would be impos-

sible to defend the agency against subsequent contention of miscount, loss, misplaced, or "destroyed in cleaning" artifacts without a complete photographic inventory. Furthermore the chain of custody would be broken and the value of these artifacts would be severely diminished.

For these reasons the State of Florida respectfully request that this Court enter an order granting its Motion to Quash the Warrant for Arrest in Rem.

Respectfully submitted,

ROBERT L. SHEVIN
Attorney General

s/ Joel D. Rosenblatt
JOEL D. ROSENBLATT
Assistant Attorney General
8585 Sunset Drive
Miami, Florida 33143

(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

(Title omitted in printing)

ORDER DENYING MOTION TO QUASH; STAYING EXECUTION TEMPORARILY; AND RULE TO SHOW CAUSE

The plaintiffs' complaint is an *in rem* and quasi *in rem* action (on in personam principles) against an unidentified wrecked and abandoned sailing vessel thought to be the "Nuestra Senora De Atocha", seeking possible possession and confirmation of title against all claimants and all the world, and, alternatively, to establish a salvage award of the highest order, filed July 18, 1975, under Rule 9(h). The wreck is located on the Continental Shelf outside the territorial waters of the United States and, necessarily, the State of Florida. Prior to the institution of this action, the

plaintiffs had brought into the Southern District of Florida numerous objects of antiquity recovered from the wreck, a substantial portion of which remains in the Southern District of Florida. A warrant in rem upon the unidentified and abandoned wreck was duly issued and served upon it by the United States Marshal. The United States was permitted to intervene as a party. Notice of the arrest of the wrecked and abandoned vessel, her cargo, etc. was published in the Key West Citizen on November 3, 1975, requiring any and all persons asserting a claim to the subject matter of this suit to appear and assert their claim.

This, of course, constituted notice to all the world, including the State of Florida. The State of Florida, although having valid constructive notice, and

indeed actual notice, of the suit and the facts involved therein and, therefore, having the opportunity to intervene in this action and assert any claim to ownership of the vessel, failed or refused to do so. On February 19, 1976, this Court entered its final judgment in favor of the plaintiffs and against all claimants. That judgment was appealed from. Thereafter, in March, 1978, the United States Circuit Court of Appeals for the Fifth Circuit affirmed this Court's judgment in all respects except that portion giving the plaintiffs exclusive title as to other claimants, if any there be, who were not parties or privies to this litigation. A substantial portion of the artifacts having been transferred by the State of Florida under an alleged contract to Tallahassee, Florida,

the Court issued a warrant for arrest in rem directing the United States Marshal to obtain possession of that part of the res which had been transferred from the Southern District of Florida to Tallahassee, and to deliver them to the Substitute Custodians of the res appointed by the Court pending the final disposition of this cause.

The State of Florida in what appears to have been an obvious case of both "court shopping" and "judge shopping" filed in this court a document titled "State of Florida's Motion to Quash Warrant for Arrest in Rem", praying that the warrant be quashed, held void by this Court, and that the State of Florida recover its costs and any further relief it might be entitled to, and almost simultaneously filed a document in the United

States Circuit Court of Appeals for the Fifth Circuit titled a "Petition for Emergency stay" of the warrant of arrest.

The Court has today received a copy of an order from the Fifth Circuit granting the petition for emergency stay pending further consideration of the subject matter by that court.

The matter is now before this Court upon the State of Florida's motion.

The accepted general rule in admiralty proceedings is that any person who has had an opportunity to intervene in an admiralty action and assert any claim to ownership of the res is bound by the court's decree. Admiralty Rules, Rule 19, 28 U.S.C.A.; Cummins Diesel Michigan, Inc. v. The Falcon (C.A. Ill.), 305 F.2d 721. Further, it is well established that if any claimant in an admi-

ralty action fails to appear and assert his claim, the court may dispose of the case without further notice to him or, in the alternative, may allow him to answer. Koufopantelis v. Cia. De. Nab. San George S.A. (C.A. N.Y.). 291 F.2d 709; cert. denied, 368 U.S. 895.

After careful consideration of the various grounds relied upon by the State, this Court is persuaded that the State's motion to quash should be at this time denied, but that execution of the arrest warrant (in accordance with the Fifth Circuit's order) be stayed pending further order of this Court.

The warrant for arrest in rem did not constitute an attempt to determine any interest or title in any portions of the subject vessel, but merely represented a means of transferring possession of

the property to the custodians appointed by the Court. The warrant recited that the State of Florida did not appear in this cause to defend or prosecute any claim that it might have. It has now been brought to the attention of the Court that the State does claim an interest in the subject property.

The State asserts in paragraph 1 of its motion that it was not a named party and, therefore, did not waive the requirement that the res be present within the territorial jurisdiction of the Court, or consent to the Court's in personam jurisdiction. Insofar as the question of jurisdiction over the res is concerned, that has been affirmatively settled against it in the Fifth Circuit's opinion, and this Court does have subject

matter jurisdiction. In personam jurisdiction will be discussed hereinafter.

In paragraph 3 of its motion, the State asserts that it has possession of and title to 25% of the res by virtue of a contract between it and Armada Research Corporation, thereby, at this late date, asserting a claim to part of the res.

This assertion goes directly to the merits of the plaintiffs' claim in the instant controversy. Where a party appears by motion and objects to the jurisdiction of the court and also submits a matter involving the merits of the action, there is a general appearance which confers upon the court in personam jurisdiction over the moving party. Thames & M.M. Insurance Co. v. United States, 237 U.S. 19 (1915); Big Vein Coal Co. v. Read, 229 U.S. 31 (1913); McKelvey v.

McKelvey, 323 So.2d 651 (Fla. App. 1976). Accordingly, the State of Florida "may equitably be treated as if [it] had been brought into court by personal process." The Fairisle, 76 F.Supp. 27 (D. Md. 1947); Mosher v. Tate, 182 F.2d 475 (9th Cir. 1950); and see Sholtz et al. v. United States ex rel. Ben Hur Life Association, 82 F.2d 780 (5th Cir. 1936). By virtue of its voluntary, general appearance in this cause, the State of Florida has waived the general requirement that the res be within the territorial jurisdiction of the court and, further, has consented to the court's jurisdiction over its interest in any portions of the vessel. Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, 5th Cir. No. 76-2151, March 13, 1978).

Even though the State had knowledge of the proceedings, had an opportunity to timely intervene and assert its claim to ownership, the Court is disposed even now to permit the State to assert its claim so that the same may be disposed of without multiplicity of actions.

Admiralty Rule C(5) provides for an order to show cause why property subject to an action should not be brought into the custody of the Court. Property covered includes the vessel itself, its engine, tackle, apparel, furniture, and personal effects. The Showboat, 47 F.2d 286 (D. Mass. 1930); The Katherine, 15 F.2d 387 (E.D. La. 1026); The Augusta, 15 F.2d 727 (E.D. La. 1920); The George Prescott, 10 F. Cas. 223 (E.D. N.Y. 1865) (No. 5,339). It further includes property removed prior to the vessel's ar-

rest. See, The Joseph Warner, 32 F.Supp. 532 (D. Mass. 1939). Ancillary process, therefore, extends to the property now held by the State. The Joseph Warner, supra; The George Prescott, supra. Therefore, pursuant to Admiralty Rule C(5), it is

ORDERED and ADJUDGED that the State of Florida is hereby directed within fifteen (15) days to show cause why the property held by the State of Florida pursuant to the alleged agreement with plaintiffs should not be delivered into the custody of the custodians appointed by the Court. Further, it is

ORDERED and ADJUDGED that the State of Florida's motion to quash and hold void the warrant for arrest in rem is hereby denied but that execution of the

warrant of arrest is hereby stayed pending further order of this Court.

DONE and ORDERED at Miami, Florida, this 14th Day of April, 1978.

s/ W. Mehrtens
Senior United States
District Court Judge

("CC" to counsel omitted in printing)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

(Title omitted in printing)

ORDER GRANTING MOTION FOR
RULE TO SHOW CAUSE

The plaintiffs having filed a motion for rule to show cause, and the Court ex mero motu having issued a rule to show cause on April 14, 1978 to the State of Florida, and being advised in the premises, it is

ORDERED and ADJUDGED that the plaintiffs' motion for a rule to show cause be and the same is hereby GRANTED. It is further

ORDERED and ADJUDGED that the State of Florida is hereby directed within fifteen (15) days to show cause before this Court why the property held by the State of Florida should not be delivered to the Custodians appointed by the Court.

Those portions of the Court's rule to show cause, dated April 14, 1978, filed herein are hereby incorporated by reference thereto.

DONE and ORDERED at Miami, Florida, this 17th day of April, 1978.

s/ W. Mehrtens
Senior United States District Judge

("CC" to counsel omitted in printing)

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

(Title omitted in printing)

On Petitions for Emergency Relief, for Supplementary Relief and for Writ of Prohibition for the United States District Court for the Southern District of Florida

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Before THORNBERRY, GODBOLD and RUBIN, Circuit Judges.

BY THE COURT:

Litigation is pending in the District Court for the Southern District of Florida concerning title to a large number of historical artifacts recovered from a sunken Spanish galleon and in the possession of the State of Florida at Tallahassee, in the Northern District of Florida. Incident to this litigation the Southern District Court issued a warrant of arrest in rem directing the United States Marshal to seize the artifacts and

deliver them to substitute custodians appointed by the court pending final disposition of the litigation. The substitute custodians are the private parties plaintiff who in the pending case claim title to the artifacts.

The state of Florida has filed in this court a petition for emergency relief, a petition for supplemental relief, and a petition for a writ of prohibition seeking to retain possession of the artifacts and questioning the jurisdiction of the Southern District Court. On April 12 a single judge of this court granted a temporary emergency stay of the warrant of arrest. On April 14 the district judge of the Southern District who had authorized the warrant of arrest stayed the execution of the warrant.

The state of Florida asserts that

the artifacts should not be delivered to another custodian until they have been curated, cleaned, documented and photographed, otherwise their authenticity as historical artifacts will be destroyed or diminished. Additionally, the state asserts that unless the items are photographed before delivery to the claimants-custodians, it may not be able to defend against possible claims that, while in the state's possession, some of the artifacts have been lost, taken or destroyed.

In order that the Southern District Court can proceed expeditiously to dispose of the litigation before it and in the interest of preserving the integrity of the artifacts as historical items should it be determined that all or some of them are the property of the State of Florida, it is ORDERED:

The temporary stay of the warrant of arrest in rem is dissolved. The United States Marshal may execute the warrant of arrest and upon doing so shall forthwith deliver custody of all of the items in question to a custodian who will take possession of them in situ and shall place them under lock or seal at their present location and hold them secure. If the parties cannot agree upon a custodian, the District Court should appoint a custodian having no interest in the suit. In all other respects the petitions of the state of Florida are DENIED.

May 15, 1978

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

(Title omitted in printing)

ORDER DENYING PETITION FOR RECONSIDERATION AND FOR CLARIFICATION

Before THORNBERRY, GODBOLD and RUBIN, Circuit Judges.

BY THE COURT:

The State of Florida requests that we reconsider our order of May 15, 1978. The question of the jurisdiction of the District Court for the Southern District of Florida is for that court to determine in the first instance on the basis of such record as may be developed in that court. The petition for reconsideration and for clarification is DENIED.

June 1, 1978

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

(Title omitted in printing)

ORDER DIRECTING MARHSAL TO EXECUTE WARRANT FOR ARREST; APPOINTING SUBSTITUTE CUSTODIAN AND SETTING HEARINGS ON ALL PENDING MATTERS

On April 6, 1978, this Court issued its Warrant for Arrest in Rem commanding the United States Marshal to take into his possession the portions of the vessel and artifacts recovered therefrom which have been in the possession of the State of Florida, Department of State, or in its custody, care or control. On April 12, 1978, a single Judge of the United States Court of Appeals for the Fifth Circuit granted a temporary emergency stay of the warrant of arrest; and on April 14, 1978, this Court also stayed the execution of the warrant. Thereafter, on May 15, 1978, the Circuit Court

of Appeals dissolved the temporary stay of the warrant of arrest and allowed the United States Marshal to execute the warrant and to deliver custody of all of the items in question to a Custodian who will take possession of them in situ and shall place them under lock or seal at their present location and hold them secure. The Court of Appeals also ordered that if the parties could not agree on a Custodian, this Court should appoint a Custodian having no interest in the suit.

The plaintiffs have filed in this court a memorandum stating that because it is to the best interest of all parties that the litigation be disposed of as expeditiously as possible, they consent to the appointment of the State of Florida, Deparment of State, as Substitute Custodian for those portions of the subject

vessel which are subject to the warrant for arrest in rem.

The State of Florida has now filed its motion for hearing and oral argument on the question as to jurisdiction. It is therefore

ORDERED and ADJUDGED that the United States Marshal is hereby commanded to forthwith execute the warrant of arrest heretofore issued by this Court on April 6, 1978. Upon seizure, the United States Marshal is directed to prepare a detailed, itemized list of all property seized by him and to file a copy in these proceedings. The Substitute Custodian is ordered and directed to furnish to the United States Marshal copies of any documents it may have including any inventories, documentation and photographs pertaining to the said artifacts to

assist the United States Marshal in making his inventory.

The State of Florida, Department of State, presently has custody and control of the said artifacts, and by agreeing to accept appointment as Substitute Custodian will accept the responsibility of safekeeping the same until further order of this Court without the payment of any fees to the Substitute Custodian.

The State of Florida, Department of State, by affidavit appended hereto as "Exhibit A" and made a part hereof, avers that it has adequate facilities and supervision for the proper safeguarding of the said artifacts and that it has adequate substance to respond in damages for loss or injury to the said artifacts or for damage sustained by third parties due to any acts, faults or negligence by said

Substitute Custodian. Further, in said affidavit, the Substitute Custodian accepts, in accordance with the terms of this order, possession of said artifacts and shall place them under lock or seal at their present location and hold them secure pending further order of this Court.

The plaintiffs, TREASURE SALVORS, INC., a corporation, and Armada Research Corp., a corporation, in consideration of the Marshal's consent to the substitution of custody, agree to release the United States and the Marshal from any and all liability and responsibility arising out of care and custody of the said artifacts, and said plaintiff further agree to hold harmless and indemnify the United States and the Marshal from any and all claims whatsoever arising out of the

Substitute Custodian's possession and safekeeping. Therefore, it is

ORDERED that the United States Marshal be and he is hereby authorized and directed, upon his seizure of the said artifacts and obtaining a complete inventory thereof, to surrender the possession thereof to the Substitute Custodian named herein, and that upon such surrender the Marshal shall be discharged from his duties and responsibilities for the safekeeping of said artifacts and held harmless from any and all claims arising whatever out of said substituted possession and safekeeping. It is further

ORDERED that the State of Florida, Department of State, be and it is hereby appointed the Custodian of said artifacts, to retain the same in its custody,

for possession and safekeeping under lock or seal at their present location, and to hold them secure until further order of this Court. It is further

ORDERED that all Marshal's costs be paid prior to the release of the said artifacts. It is further

ORDERED that the Substitute Custodian must receipt for the said artifacts, and the Marshal must attest to the date and time of release on a certified copy thereof.

Pursuant to the direction of the Circuit Court of Appeals to proceed expeditiously to dispose of the litigation before it, and the State of Florida's motion for hearing and oral argument on the question of jurisdiction, it is

ORDERED that this matter be and it

is hereby set for an evidentiary hearing and argument before this Court at 9:30 A.M. on July 27, 1978, upon the question of the jurisdiction of this Court over the subject matter of this litigation. It is further

ORDERED that if this Court finds that it is without jurisdiction, it will enter an order dismissing the litigation; however, if this Court finds that it does have jurisdiction, it will then immediately hold an evidentiary final hearing on the merits of all issues otherwise involved herein.

DONE and ORDERED at Miami, Florida, this 30th day of June, 1978.

s/ W. Mehrtens
Senior United States
District Judge

("CC" to counsel omitted in printing)

[EXHIBIT A]

A F F I D A V I T

W. ROBERT WILLIAMS personally appeared before me, and being duly sworn, deposes and says:

I am the Deputy Secretary of the State of Florida and former Director of the Division of Archives, History and Records Management.

If the State of Florida is required to relinquish possession of the treasure trove and other historically valuable objects of antiquity which the State is presently substitute custodian in this proceeding, prior to a ruling by the Fifth Circuit Court of Appeals, the State of Florida will suffer irreparable damage. If the Fifth Circuit Court of Appeals rules in favor of the State and no stay of this Court's Final Order has

been granted, there is a high probability that the collection as a whole may well be broken up and individual pieces offered for sale; some or many pieces may even be sold. It would be difficult for the State to be certain it is getting back the exact same items and not look alike bona fide copies and even counterfeits. All of the items in question are catalogued and recorded as to their provenience from within the wreck site. The provenience data are important because they allow reconstruction of the plan of the wreck site and groups of items that were associated on board the original vessel before wreckage. Such associations reflect the kinds and quantities of items stored together on board and intended, in some cases, for complementary use.

This kind of information is extremely important to naval historians and others concerned with data relating to ocean commerce. If the State's collection is broken up, the State's cataloging system and catalog of individual objects will be discarded, and much of the provenience data recorded for individual pieces will be lost; objects would almost certainly not be sold with the State's catalog tags still attached. If the pieces are then returned to the State it will be impossible in many instances to re-associate items, especially numbers. The guarantee of State protection of these historically valuable items on behalf of Florida citizens may well be permanently lost.

The arrested property may or may not be those which would be priced highest in

a free market exchange. Rather, they are items which appear to possess the greatest historical and scientific value. This value is not directly convertible into monetary value, and certainly cannot be compensated for with money.

Many of the items require regular curatorial inspection and preservation laboratory care to insure that they do not deteriorate. Once out of the State's care and after sale to private owners, the physical care of the objects would not be adequate. The State's laboratory facilities where the property in question is presently located are the best in the State for providing the necessary care, and the objects merit the best possible physical protection.

It is in the public interest that the State of Florida be allowed to

continue as substitute custodian for the items in question until after a ruling by the Fifth Circuit Court of Appeals.

s/ W. Robert Williams
W. ROBERT WILLIAMS

(Notary's signature and seal omitted in printing)

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF FLORIDA

No. 75-1416-Civ-WM

TREASURE SALVORS, INC.,
a corporation and
ARMADA RESEARCH CORP.,
a corporation,

Plaintiffs,

vs.

THE UNIDENTIFIED WRECKED
AND ABANDONED SAILING
VESSEL, her tackle,
armament, apparel and
cargo located within 2500
yards of a point at coor-
dinates 24°31.5' north
latitude and 82°50' west
longitude, said sailing
vessel is believed to be
the NUESTRA SENORA DE ATOCHA,

Defendant.

O R D E R

MEMORANDUM INCLUDING FINDINGS OF FACT AND
CONCLUSIONS OF LAW

(Pursuant to U.S. Supreme Court Rule
30.1, the Court is respectfully directed
to the Appendix to the Petition for Writ
of Certiorari, at A61-163.)

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 75-1416-Civ-WM

TREASURE SALVORS, INC.,
a corporation and
ARMADA RESEARCH CORP.,
a corporation,

Plaintiffs,

vs.

THE UNIDENTIFIED WRECKED AND ABANDONED SAILING VESSESL, her tackle, armament, apparel and cargo located within 2500 yards of a point at coordinates 24°31.5' north latitude and 82°50' west longitude, said sailing vessel is believed to be the NUESTRA SENORA de ATOCHA,

Defendant.

O R D E R

FINAL JUDGMENT

The Court having determined that the present proceedings are not barred by the Eleventh Amendment and that it has jurisdiction over the articles of salvage arrested pursuant to the warrant issued

on April 6, 1978, therefore it is

ORDERED and ADJUDGED and DECREED that the Division of Archives, History and Records Management, Department of State, State of Florida, take nothing for its claim and that its claim is denied in all respects and that all costs be taxed against the Division of Archives, Department of State, State of Florida, it is further

ORDERED and ADJUDGED and DECREED that Treasure Salvors, Inc. and Armada Research Corp. have full right and title to articles arrested and that they are entitled to possession and that the United States Marshal, who has possession and control of such articles, shall deliver them to Treasure Salvors, Inc. and Armada Research Corp.

The Court retains jurisdiction to issue the necessary orders to enforce this decree.

DONE and ORDERED at Miami, Florida, this 21st day of August, 1978.

s/ W. Mehrtens
Senior United States
District Judge

("CC" to counsel omitted in printing)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

(Title omitted in printing)

DEFENDANT STATE OF FLORIDA'S MOTION TO STRIKE

Please take notice that the Defendant State of Florida, pursuant to Rule 12(f), Federal Rules of Civil Procedure, moves to strike from Plaintiff's Memorandum on Jurisdiction, Plaintiff's defense of res judicata on the grounds that this defense was not affirmatively pleaded in Plaintiff's Supplemental Complaint for Declaratory Injunctive and Other Relief as required by Rule 8(c), Federal Rules of Civil Procedure, and thus is not properly before the Court.

Defendant further moves to strike from Plaintiff's Memorandum on Jurisdiction the paragraphs listed below on the grounds that statements contained therein

are not supported by the record; they are calculated to harm and prejudice Defendant's position; and are further impertinent and immaterial. Thus, they are not properly before the Court.

1. Page 3, lines 17 and 18 -- the reference to and involvement by the Division of Archives with the United States.

2. Page 3, line 29 -- the reference to the Division of Archives "cooperation" in the litigation of the suit.

3. Page 4, lines 2, 3, and 4 -- the reference to the Division of Archives coercing the acceptance of a salvage conctract under which it gave nothing.

4. Page 4, lines 16, 17 and 18 -- the reference to the Division of Archives knowledge regarding the validity of the contract claim.

5. Page 4, lines 24-37 -- the reference to the Division of Archives "encouragement" to the United States, the Division of Archives plan and in general the alleged conduct of the Division of Archives, which is totally unsupported by the record.

6. Page 5, lines 27-34 -- the reference to the Division of Archives knowledge regarding its rights being in jeopardy in cooperation with the federal government, and negotiations with the federal government.

7. Page 6, lines 4-11 -- the reference to an attorney for the Florida Secretary of State's work with the federal government on this case and the Division of Archives negotiations with the federal government.

8. Page 7, lines 24-28 -- the

reference to the Division of Archives cooperation with the federal government and relying on it to protect the Division's interest.

9. Page 9, lines 4-8 -- the reference to the Division of Archives negotiation with the federal government.

10. Page 9, lines 39-41 -- the reference to the Division of Archives consultation with the federal government.

11. Page 10, lines 1-6 -- the reference to the Division of Archives reliance upon the United States to protect the Division's interests.

12. Page 13, lines 37-41 -- the reference to the Division of Archives advising the federal government in its prosecution of the case.

13. Page 14, lines 35-41 -- the reference to the Division of Archives

attorneys working with the federal government.

14. Page 26, lines 31-37 -- the reference to Chapter 267 being in conflict with substantive maritime law.

15. Pages 27 and 28 -- all of these two pages in their entirety. No argument was made during the hearing regarding the constitutionality of Chapter 267, Florida Statutes, or any other conflict of Chapter 267 with federal substantive law.

16. Page 30, lines 26-30 -- the reference to the Division of Archives power to sue and be sued. Testimony on this point is a conclusion of law and is thus improper and immaterial.

17. Page 30, lines 36-42 -- the reference to the Legislature's waiver of immunity authorizing suits to quiet title. This is a new matter argued by

Plaintiff after the hearing and is further impertinent to the subject matter of this litigation.

18. Page 32, lines 32-36 -- reference to the State of Florida's misrepresentations.

For these reasons and those in the accompanying Memorandum of Law, Defendant requests that the Court enter an Order granting Defendant's Motion to Strike.

Respectfully submitted,

ROBERT L. SHEVIN
Attorney General

s/ Bernard S. McLendon
BERNARD S. McLENDON
Assistant Attorney General

Department of Legal Affairs
Civil Division
The Capitol
Tallahassee, Florida 32304
904/488-1573

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT STATE OF FLORIDA'S MOTION TO STRIKE

At the conclusion of the evidentiary hearing before the Court in this matter, held on July 27 and 28, 1978, this Court advised counsel for the respective parties that they would have a certain time in which to file a memorandum of law in support of their arguments during the hearings. Counsel for the State of Florida concluded that this meant a memorandum could be filed citing cases in support of the parties' arguments and evidence presented during the hearings.

It appears that Treasure Salvors is determined to assert their theory of what this case is about, even though the evidence has been received by this Court and little or no evidence was presented during the hearing to support their theory.

Their Memorandum on Jurisdiction, etc., is replete with theories, misstatements and legal arguments have been made after the hearing for the first time.

Because Plaintiff has chosen to use these tactics, Defendant has moved to strike arguments made by Plaintiff that have been waived, raised for the first time, or are immaterial, impertinent and calculated to be prejudicial to Defendant. Under Rule 12(f), this Court upon its own initiative at any time may order striken from any pleading any immaterial or impertinent matter.

In its Memorandum on Jurisdiction, etc., Plaintiff has raised the defense of res judicata which under Rule 8(c), Federal Rules of Civil Procedure, is an affirmative defense and therefore must be affirmatively pleaded. However, nowhere

on the face of Plaintiff's Supplemental Complaint for Declaratory, Injunctive and Other Relief is there an allegation of res judicata. If an affirmative defense is not pleaded, it is waived to the extent that the party who should have pleaded the affirmative defense may not introduce evidence in support thereof. 2A Moore's Federal Practice, p. 1853 and cites therein. See also 5 Wright and Miller, Federal Practice and Procedure, p. 341. In spite of Plaintiff's theory regarding "privity" between the United States and Florida, the testimony of Plaintiff's witnesses did not conclusively establish that Florida and the United States had such a close relationship that Florida should be deemed in privity with the United States and thus bound by the Fifth Circuit's earlier rul-

ing in this case. Assuming arguendo that such a relationship did exist, Plaintiff waived the defense of res judicata because they failed to affirmatively plead same in their Supplemental Complaint for Declaratory, Injunctive and Other Relief. As the Court held in Crown v. Cherokee Wonderland, Inc., 379 F.2d at p. 54 (4th Cir. 1967):

> Res judicata is an affirmative defense which must, pursuant to Rule 8(c) of the Federal Rules of Civil Procedure, be pleaded affirmatively in order to apprise the opposing party that such a defense will be interposed at trial.

See also, Badway v. United States, 367 F.2d 22 (1st Cir. 1966). Since the testimony presented by Plaintiff did not establish that there was a close relationship between the United States and Florida and therefore privity existed,

there is no basis to allow an amendment under Rule 15(b), Federal Rules of Civil Procedure, to conform to the evidence.

The Memorandum on Jurisdiction, etc., filed by Treasure Salvors pursuant to this Court's Order on the close of the hearings in this case is replete with misstatements of fact and certainly is not based upon the evidence in this case. In contrast, Defendant State of Florida's Memorandum is confined to the conclusive evidence Defendant presented during the hearings, the legal arguments in support of this evidence and cases in support of the legal arguments raised by Defendant. For a party to reargue in a memorandum to the court their theory about the case after the hearing, and the record does not contain evidence to support the party's theory, is indeed impertinent and

immaterial. Plaintiff's Memorandum should have been addressed to the facts they were able to establish during the hearings, the law in support thereof, and legal argument made at that time. For a party to argue their theory of the case instead, one can logically conclude that the party established nothing factually that it can bring to the Court's attention.

Therefore, Defendant requests that the Court enter an Order granting it's Motion to Strike.

Respectfully submitted,

ROBERT L. SHEVIN
Attorney General

s/ Bernard S. McLendon
BERNARD S. McLENDON
Assistant Attorney General
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Civil Division
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Tallahassee, Florida 32304
904/488-1573

(Certificate of Service omitted in printing)

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 78-2950

IN RE: STATE OF FLORIDA
DEPARTMENT OF STATE,

Petitioner/Appellant,

VERSUS

TREASURE SALVORS, INC., etc.,

Plaintiffs/Appellees,

THE UNIDENTIFIED, WRECKED AND
ABANDONED SAILING VESSEL, ETC.,

Defendant.

Appeal from the United States
District Court for the Southern
District of Florida

(Pursuant to U.S. Supreme Court Rule 30.1, the Court is respectfully directed to the Appendix to the Petition for Writ of Certiorari, at A6-60.)

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 78-2950

D. C. Docket No. 75-1416-Civ-WM

IN RE: STATE OF FLORIDA, DEPARTMENT OF STATE,
Petitioner-Appellant,
versus
TREASURE SALVORS, INC., a Corporation, and ARMADA RESEARCH CORP., a Corporation,
Plaintiffs-Appellees,
THE UNIDENTIFIED, WRECKED and ABANDONED SAILING VESSEL, Etc.,
Defendant.

Appeal from the United States District Court for the Southern District of of Florida

Before GEWIN, RUBIN and SAM D. JOHNSON, Circuit Judges.

J U D G M E N T

(Pursuant to U.S. Supreme Court Rule 30.1, the Court is respectfully directed to the Appendix to the Petition for Writ of Certiorari, at A4-5.)

Office-Supreme Court, U.S.
FILED
MAR
ALEXANDER L. STEVAS,
CLERK

No. 80-1348

IN THE

Supreme Court of the United States

October Term, 1980

STATE OF FLORIDA,
DEPARTMENT OF STATE, *Petitioner,*

-vs-

TREASURE SALVORS, INC.,
ARMADA RESEARCH CORP., *Respondents.*

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

BRIEF IN OPPOSITION

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Counsel for Respondents

QUESTION PRESENTED

In a maritime in rem proceeding brought by the finders and salvagers wherein the State of Florida's objection under the Eleventh Amendment to the arrest of certain articles of salvage from the wrecked vessel is predicated on a disputed claim of state ownership does the federal district court have the power to make appropriate jurisdictional findings, *i.e.* that the vessel and its cargo, which were sunk before Florida became a state and are located outside of the territorial boundaries of the state, are not and were never owned by the State of Florida.

Note: The Question Presented as worded by the State of Florida assumes the property is "owned" by the State. Petition for Certiorari at I. Both the federal district court and the court of appeals expressly recognized that the Eleventh Amendment would be applicable to an in rem proceeding *if* the vessel and cargo in question *were owned* in fact by the state.

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NOTE: In accordance with the Supreme Court Rule 28.1, as amended, Respondents TREASURE SALVORS, INC., and ARMADA RESEARCH CORP., declare they have no parent companies, subsidiaries or affiliates.

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No. 80-1348

IN THE

Supreme Court of the United States

October Term, 1980

STATE OF FLORIDA,
DEPARTMENT OF STATE,

Petitioner,

—vs—

TREASURE SALVORS, INC.,
ARMADA RESEARCH CORP.,

Respondents.

On Petition for Writ of Certiorari to The United States Court of Appeals For the Fifth Circuit

BRIEF IN OPPOSITION

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit is reported at 621 F.2d 1340 (1980). The decision of the United States District Court for the Southern District of Florida is reported at 459 F.Supp. 507 (1978).

STATEMENT OF THE CASE

Review is sought of the second of two appeals involving ownership of salvage articles from the *Atocha* which was lost in 1622 off the coast of Florida. The respondents Armada Research Corporation and Treasure Salvors, Inc. [hereinafter Treasure Salvors], located the wreck and recovered a substantial amount of salvage through a prolonged and continuing effort at great cost, including the loss of several lives. See *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, Nuestra Senora de Atocha*, 569 F.2d 330, 333 (5th Cir. 1978), affirming 408 F.Supp. 907 (S.D.Fla. 1976).

As finders and salvagers, Treasure Salvors instituted in rem and in personam admiralty proceedings concerning the wreck and articles of salvage. In the previous admiralty proceeding, the United States appeared and voluntarily submitted itself to in personam jurisdiction. 569 F.2d at 333. The United States claimed title under the English rule of sovereign prerogative to all of the articles of salvage including those claimed by Florida in the instant proceeding. *Id.* at 340-43. The State of Florida closely monitored the earlier admiralty proceeding, but chose not to formally intervene, as it had negotiated with the United States to protect its claim to the property. 621 F.2d at 1343-44; 459 F.Supp. at 516. On the first appeal title was confirmed in Treasure Salvors as against the United States and privies to the litigation. 569 F.2d at 335-36. The United States did not seek further review.

Following the earlier appeal, an ancillary warrant of arrest was issued by the trial court to seize certain articles of salvage in the custody of agents and employees of the Petitioner-State of Florida. 621 F.2d at 1344. The State filed a Motion to Quash the warrant of arrest in the district court, and an Emergency Petition for Writ of Prohibition or Stay in the Fifth Circuit. *Id.* The Fifth Circuit issued a temporary stay, which it subsequently

dissolved, and denied the Petition for Prohibition. 459 F.Supp. at 508. In denying the Petition for Reconsideration, the Fifth Circuit stated the question of jurisdiction was initially for the trial court to decide:

> The question of the jurisdiction of the District Court for the Southern District of Florida is for that court to determine in the first instance *on the basis of such record as may be developed* in that court....Denied. R.v.II 417 (emphasis added).

The trial court denied the Motion to Quash, but stayed execution temporarily and issued a Rule to Show Cause under Admiralty Rule C(5). 621 F.2d at 1344. The trial court afforded the parties a full evidentiary hearing on the jurisdictional issues and merits. *Id.* Judgment was entered in favor of Treasure Salvors. The trial court summarized its rulings as follows:

> For the reasons that follow, this Court *holds:* it had jurisdiction to issue the warrant of arrest and seize the property in question; the Division of Archives is bound by the earlier judgment of this Court; Treasure Salvors, under the judgment of this Court, as affirmed by the Fifth Circuit, is the owner of the property and entitled to possession; the claims of the Division of Archives to be the owner of the property, and to be accordingly entitled to the possession of such, are wholly without merit; and the present proceedings are not barred by the Eleventh Amendment to the Constitution of the United States nor by the Doctrine of Sovereign Immunity.

459 F.Supp. at 511.

The State of Florida's Eleventh Amendment argument depended on the assertion that the State was the owner of the articles of salvage. This was bottomed on the contention that the location of the wreck site was on sovereign submerged lands as Section 267.061(1) (b),

Florida Statutes, purported to grant Florida title to objects abandoned on state owned lands.* The trial court below found:

> The portion of the *res* seized under the warrant of arrest was comprised of articles of salvage recovered from a wreck site located *outside* the jurisdiction of the State of Florida and on lands not owned or possessed by the State of Florida. Section 267.061(1) (b), Florida Statutes, which purports to vest title in the State *does not apply* since the property was not on "sovereignty lands of the State."

459 F.Supp. at 527 (emphasis added).

Under Supreme Court guidelines for applying the Eleventh Amendment and the doctrine of sovereign immunity to admiralty proceedings, the trial court made several jurisdictional findings of fact including that "the Division of Archives is not and never was the owner of the ship *Atocha*, her tackle, apparel, cargo, etc." 459 F.Supp. at 527. Accordingly the trial court concluded that the present proceeding was not barred by the Eleventh Amendment nor the doctrine of sovereign immunity. Florida on appeal did not contest the fact that the wreck site was now located outside the boundaries of the State of Florida. Instead, in a novel argument, Florida contended that the Supreme Court decision in *United States v. Florida*, 420 U.S. 531 (1975), which delineated Florida's

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*Section 267.061 (1) (b) provides:

> It is further declared to be the public policy of the state that all treasure trove, artifacts and such objects having intrinsic or historical and archaeological value which have been abandoned on state-owned lands or state-owned sovereignty submerged lands shall belong to the state with the title thereto vested in the Division of Archives, History, and Records Management of the Department of State for the purpose of administration and protection.

boundary line, could not be applied retroactively. The jurisdictional findings of the trial court were affirmed by the Fifth Circuit on appeal, that Court concluding:

> In the case at bar, ownership of the salvaged items is determinative of both the eleventh amendment and the merits. Since we agree with the trial court's assessment that Florida lacks an ownership interest in the artifacts, *see* pp. 1348-1349, *infra*, we affirm the judge's holding that the order to show cause is not, in this case, a suit against a state.

621 F.2d at 1346 (footnote omitted).

Florida does not contend in its Petition for Certiorari that the jurisdictional fact findings are erroneous, but relies upon the concept that the State's mere assertion of the Eleventh Amendment denies the federal court jurisdiction. Petition for Certiorari at 7-8. This was the view of Judge Rubin expressed in his dissent in the Fifth Circuit. 621 F.2d at 1350.

As additional and alternative reasons for its holdings, the trial court ruled that the State of Florida had consented by statute to be sued in state or federal court in actions to foreclose liens or quiet title to property in which the state has or claims an interest. 459 F.Supp. at 528. Treasure Salvor's claim against the property would constitute a salvage lien; thus Section 69.041* of the

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*The statute provides in relevant part:

> (1) Under the conditions prescribed in this section for the protection of the state, the state may be named a party to a civil action in any court of this state, or in any district court of the United States, having jurisdiction of the subject matter, either:
>
> (b) For the foreclosure of a mortgage or other lien on real or personal property on which the state has or claims a mortgage or other lien.

Florida Statutes gives an express legislative waiver of immunity. In affirming, the Court of Appeals did not expressly discuss the alternative holdings of the trial court.

REASON WHY THE WRIT SHOULD BE DENIED

A. There is no conflict by the decision below in holding that the district court under the Eleventh Amendment has power to make appropriate jurisdictional fact findings.

The apparent basis under Supreme Court Rule 17 for seeking Certiorari is a purported conflict with decisions by this Court and other decisions by the same circuit. For the reasons that follow, there is no conflict with decisions of this Court, and while intra-circuit conflict is not basis for Certiorari, there is no conflict with other decisions by the Fifth Circuit. The cases cited by Florida in its Petition for Certiorari (page 10) follow the rule that the Eleventh Amendment is applicable to admiralty actions where the state is the owner. None of the cases even suggest that if ownership by the state is *disputed* that the court does not have the power to resolve the jurisdictional issue.*

Both the district court and the Fifth Circuit expressly

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*In two of the cases cited, *Intracoastal Transp., Inc. v. Decatur County, Georgia*, 482 F.2d 361 (5th Cir. 1973) and *Red Star Towing & Transp. Co. v. State of Connecticut*, 431 F.Supp. 1003 (D. Conn. 1976), there was *no dispute* that the state owned and maintained the bridges which had caused the plaintiffs' damage, so that the question of ownership was never at issue. In another case, *Platoro Ltd., Inc. v. Unidentified Remains of a Vessel*, 508 F.2d 1113, 1115 (5th Cir. 1975), the Fifth Circuit found it unnecessary to consider the claim of sovereign immunity because it reversed for lack of in rem jurisdiction. Therefore, none of these cases involved the issue in the instant case of whether a federal court may make jurisdictional findings to determine that the property in question is not and was never owned by the state, rendering the Eleventh Amendment inapplicable.

recognized that the Eleventh Amendment is applicable to admiralty in rem proceedings *when the state owns the vessel in question* as held by this Court in *In re The State of New York* (The Queen City) 256 U.S. 503 (1921). Because Florida's unsupported claim of ownership was duly challenged, the question of ownership was regarded as a jurisdictional matter to be judicially resolved.

The Fifth Circuit's interpretation and application of *The Queen City* expressly appears in the opinion below:

> The *Queen City* tells us that when a state submits uncontroverted evidence of ownership in an admiralty in rem action, the district court is bound to accept the assertion and apply the eleventh amendment accordingly. In the case at bar, however, we have a *controverted* claim of ownership. Treasure Salvors offered evidence and legal arguments to show that it, and not Florida, owned the artifacts from the *Atocha*. Such an offer is the "special challenge" that the Supreme Court envisioned in the *Queen City*. This challenge operates to rebut the presumption of validity attributed to a state's ownership claim.
>
> Once an appropriate challenge is made, a district judge is no longer compelled to conclude that the state owns the res in dispute. Instead, the Court must make a jurisdictional determination very similar to that made in the classic "jurisdiction to determine jurisdiction" line of cases. In that genre, the pivotal jurisdictional question involves essentially the same analysis as is posed by the merits of the case. See *United States v. United Mine Workers*, 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884 (1957). Where "the issue of jurisdiction is inextricably intertwined with the merits of the controversy," the court retains the case and resolves the issue, since federal courts "always have jurisdiction to determine our

jurisdiction." *Nestor v. Hershey*, 425 F.2d 504, 511 (D.C. Cir. 1969).[19]

621 F.2d at 1345-46 (emphasis in original).*

By analogy, this Court has recognized in other maritime cases that a claim of sovereign immunity against arrest of a vessel asserted by a foreign government, if challenged, will necessitate the district court to make appropriate jurisdictional findings as to the ownership of the vessel.

In *The Navemar*, 303 U.S. 68 (1933), the Supreme Court considered whether a claim of immunity from arrest of a vessel by the Republic of Spain was an issue for the court to decide. The Court of Appeals for the Second Circuit accepted Spain's suggestion of sovereign immunity as conclusive but the Supreme Court reversed saying:

> This we think was a mistaken view of the force and effect of the suggestion. Admittedly...a public vessel...is immune from suit in the courts of admiralty of the United States....But [the district court] was not bound, as the Court of Appeals thought, to accept the allegations of the suggestion as conclusive....
>
> But the filed suggestion, though sufficient as a statement of the contentions made, was not proof of its allegations. This Court has explicitly declined to give such a suggestion the force of proof ....

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*The Fifth Circuit stated in its footnote:

[19]This approach is especially desirable in admiralty in rem actions. Federal courts have exclusive jurisdiction over admiralty in rem proceedings. *Madruga v. Superior Court of California*, 346 U.S. 556, 74 S.Ct. 298, 98 L.Ed. 290 (1954), G. Gilmore and C. Black, The Law of Admiralty 1-13 (2d ed. 1975). If the mere assertion of ownership by a state of a res was sufficient to invoke the eleventh amendment, petitioners such as Treasure Salvors would find themselves stranded without a forum in which to litigate their claim. 621 F. 2d at 1346.

303 U.S. 68, 74-75 (citing *In re Muir* 254 U.S. 522 (1920)). In *In re Muir* the Court said:

> [I]t is apparent that the status of the Gleneden [the ship alleged to be in British service]...is at best doubtful and uncertain, both as matter of fact and in point of law. The jurisdiction of that court is correspondingly in doubt, *for it turns on the status of the vessel*.... The Court may take up again the question of its jurisdiction.

254 U.S. 522, 533 (1920) (emphasis added).

The sole situation in which an assertion of ownership by a foreign sovereign is considered conclusive is where the United States government *officially* recognizes the foreign state to be the owner. *The Navemar,* 303 U.S. at 434. The exception is not applicable here as we do not have a diplomatic matter involving the conduct of foreign affairs; moreover, the United States itself in the earlier case unsuccessfully claimed to be the owner of the articles of salvage in question.

In an in rem proceeding against a vessel or articles of salvage, the vessel or articles of salvage will be arrested (placed under control or otherwise constructively secured) by the United States Marshal. The rationale, in essence, is if the vessel or property is owned by the state or sovereign, the arrest will be considered a suit against the state or sovereign; if not owned by the state, the arrest of the property does not constitute a suit against the state. Thus the status of the vessel or articles of salvage becomes a jurisdictional fact. In the present case, no judgment has been sought against the State of Florida. The State apparently does not contest the correctness of the jurisdictional fact issues found by the trial court and affirmed by the Court of Appeals. It contends that the federal court has no power to consider whether an Eleventh Amendment objection is valid once the State raises the issue. Petition for Certiorari at 7-8. No case by

this Court or a Court of Appeals so holds. As the trial court stated, the Eleventh Amendment "is not *both* a self-proclaimed *and* self-determined ukase of the state." 459 F.Supp. at 527 (emphasis in original).

This Court in considering the Eleventh Amendment has consistently recognized that the question of whether a suit in fact and in law is against a state is a matter for judicial determination. Indeed, in numerous cases the courts have determined that a suit, notwithstanding a plea of the Eleventh Amendment, was not a suit against a state. *See, e.g., Hutto v. Finney,* 437 U.S. 678 (1978); *Ray v. Atlantic Richfield Co.,* 435 U.S. 151 (1978); *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976); *Parden v. Terminal Railway,* 337 U.S. 184 (1964).

For example, in a suit to enjoin the enforcement of a state statute, this Court has recognized that if the statute is unconstitutional the proceeding is not one against the state. The Court commented on this proposition in *Ex Parte Young:*

> The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity.

209 U.S. 123, 163 (1907).

In addition to the non-application of the Eleventh Amendment and the statutory consent to be sued in federal court on matters involving a lien on property that is set forth in Section 69.041, *Florida Statutes,* Florida common law as declared by the Florida Supreme Court recognizes that sovereign immunity does not extend to cover this case. The state supreme court has noted: "[Sovereign immunity] will not relieve the State against any illegal act for depriving a citizen of his property;

neither will it be permitted as a plea to defeat the recovery of...property wrongfully taken by the State through its officers and held in the name of the state." *State Road Department of Florida v. Tharp*, 1 So.2d 868, 869 (Fla. 1949). Whether this be called a waiver, consent to be sued, or a statement of the limits of Florida's sovereign immunity under the Eleventh Amendment, the result is the same. *See* 459 F.Supp. at 528-30.

CONCLUSION

The decision below does not conflict with any decisions by this Court or with any decisions by another Court of Appeals. The opinion below is fully in accord with the principles of law established by this Court. There is no reason under the guidelines set forth by this Court in Rule 17 to grant Certiorari in this case. The Petition for Certiorari should be denied.

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ON WRIT OF CERTIORARI
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FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

In their Brief in Opposition to the Petition for Writ of Certiorari, Respondents raise three points intended to circumvent the Eleventh Amendment's application to this case. The State of Florida

contends that the Eleventh Amendment's proscription is unequivocal and renders any judgment against a state by a district court void for want of subject matter jurisdiction.

Respondents first cite United States v. United Mine Workers, 330 U.S. 258 (1947) in support of the bootstrap jurisdiction principle, or that a court has "jurisdiction to determine its jurisdiction." That case upheld the power of a district court to hold a party in contempt for disobedience of an order directed to that party, even if the order violated was later set aside on appeal.

The Court emphasized, however, that this was so in situations "where. . . the subject matter of the suit, as well as the parties, was properly before the

Court" and "where the elements of federal jurisdiction were clearly shown." 330 U.S. at 294.[1] Mine Workers is not authority or justification--nor has it been cited as such--to defeat the purpose of the Eleventh Amendment.

Respondents' reliance on The Navemar, 303 U.S. 68 (1938) and In re Muir, 254 U.S. 522 (1921) is similarly misplaced and inapposite. These cases are solely concerned with the procedure which must be followed by a foreign government in

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[1]The case is most often cited in proceedings wherein a district court is held to have inherent injunctive powers to preserve the status quo pending a later determination as to its jurisdiction. See, e.g., Chicago and N.W. Ry. Co. v. United Transp. Union, 422 F.2d 979, 984-985 (7th Cir. 1970); Stewart v. Dunn, 363 F.2d 591 (5th Cir. 1966); c.f., United States v. Holland, 552 F.2d 667, 675 (5th Cir. 1977); United States v. Thompson, 319 F.2d 665, 667-668 (2d Cir. 1963); Fong Sik Leung v. Dulles, 226 F.2d 74, 78 (9th Cir. 1955).

asserting its sovereign immunity in United States courts and are thus patently inapplicable to suits in admiralty against a State. See, e.g., Southeastern Leasing Corp. v. Stern Dragger Belogorsk, 493 F.2d 1223 (1st Cir. 1974); Flota Maritima Browning de Cuba v. Motor Vessel Ciudad, 335 F.2d 619, 624 (4th Cir. 1964).

Finally, Respondents argue that Section 69.041, Florida Statutes (1979) declares that Florida has consented to suit in state or federal courts "in actions to foreclose liens or quiet title to property in which the state has or claims an interest." Brief in Opposition at 5-6; 9-10. Such an assertion reflects a misreading of the statute, which provides that the state may be sued in state

or federal courts "[f]or the foreclosure of a mortgage or other lien on real or personal property on which the state has or claims a mortgage or other lien." 69.041(b) (emphasis added). This has been interpreted to be a lien statute only,[2] and it is not a waiver of Florida's Eleventh Amendment immunity from suits filed in federal courts to recover property owned by the State.

It is fundamental that statutes waiving sovereign immunity are to be strictly construed. Edelman v. Jordan, 415 U.S. 651, 663 (1974). Furthermore, State Road Dept. v. Tharp, 1 So.2d 868 (Fla. 1949), quoted by Respondents to

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[2]Seaside Properties, Inc. v. State Rd. Dept., 121 So.2d 204 (3 DCA Fla. 1960).

defeat the State's claim of sovereign immunity here, has been restricted in that it has application only to contract actions for damages against the State Road Department (specifically provided for by statute) and/or eminent domain proceedings wherein compensation for the taking of property is at issue. See, Florida State Turnpike Authority v. Anhoco Corp., 116 So.2d 8, 15 (Fla. 1959).

CONCLUSION

The decision by the Court of Appeals is in conflict with this Court's decision in In re New York, 256 U.S. 490 and 256 U.S. 503 (1921), as well as with Red Star Towing and Transportation Co. v. Department of Transportation, 423 F.2d 104 (3d Cir. 1970). No doctrine of jurisdic-

tional construction can apply to abrogate the clear mandate of the Eleventh Amendment. Accordingly, Certiorari should be granted under Rule 17.

Respectfully submitted,

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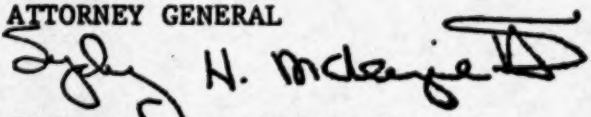

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QUESTIONS PRESENTED

I. Whether the Eleventh Amendment to the United States Constitution precludes an *in rem* action in federal court where the private party suit against the state has failed to demonstrate waiver of the eleventh amendment guarantee of sovereign immunity.

II. Whether the alleged mistake of fact found by the Courts below to circumvent the eleventh amendment was the result of a misinterpretation of *United States v. Florida*, which defined Florida's boundaries only for purposes of the Submerged Lands Act.

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No. 80-1348

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

STATE OF FLORIDA

DEPARTMENT OF STATE,

Petitioner,

-vs-

TREASURE SALVORS, INC.,

ARMADA RESEARCH CORP.,

Respondents.

ON WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The decision of the United States

Court of Appeals for the Fifth Circuit is

reported at 651 F.2d 1340 (5th Cir. 1981)

and is reproduced, in accordance with the provisions of U.S. Supreme Court Rule 30.1, in the Appendix to the Petition for Writ of Certiorari at A8-20.

The decision of the United States District Court for the Southern District of Florida is reported at 424 F.Supp. 702 (S.D. Fla. 1976) and is reproduced, in accordance with the provisions of U.S. Supreme Court Rule 30.1, in the Appendix to Petition for Writ of Certiorari at A81-103.

JURISDICTION

The opinion of the Court of Appeals was entered on July 24, 1980. Rehearing en banc was denied on October 17, 1980, and the mandate issued on October 24, 1980. Jurisdiction to review the judgment of the Court of Appeals is conferred on this Court by 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES
INVOLVED

U.S. Constitution, Article III,
Section 2

The judicial power shall extend
. . . --to all cases of admiralty
and maritime jurisdiction, . . .

U.S. Constitution, Amendment 11

The judicial power of the United
States shall not be construed to
extend to any suit in law or
equity, commenced or prosecuted
against one of the United States
by citizens of another State, or
by citizens or subjects of any
foreign State.

Florida Constitution, Article I
(1868)

(relevant portions of which are
set out in full in the appendix
hereto).

Florida Constitution, Article II,
Section 1 (1868 and 1968)

(relevant portions of which are
set out in full in the appendix
hereto).

Florida Constitution, Article X,
Section 13

> Suits against the state.--Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating.

43 U.S.C. §1301

(relevant portions of which are set out in full in the appendix hereto).

Florida Statutes, Section 267.061(2)(a)

> (2) It shall be the responsibility of the Bureau of Historic Sites and Properties to:
>
> (a) Locate, acquire, protect, preserve, and promote the location, acquisition, and preservation of historic sites and properties, buildings, artifacts, treasure trove, and objects of antiquity which have scientific or historical value or are of interest to the public, including, but not limited to, monuments, memorials, fossil deposits, Indian habitations, ceremonial sites, abandoned settlements, caves, sunken or abandoned ships, or any part thereof.

STATEMENT OF THE CASE

Pursuant to the authority granted by the Archives and History Act, Fla. Stat.

§267.061, the State of Florida, Department of State, Division of Archives, History and Records Management entered into salvage contracts with Armada Research Corp. (Treasure Salvors, Inc.) on April 26, 1971. Under the contracts, to be renewed annually, Treasure Salvors was to conduct underwater salvage upon what was believed to be the Nuestra Senora de Atocha, which sank in a hurricane in 1622. JA 20. The Atocha was thought to rest upon bottomlands within the territorial jurisdiction of the state of Florida, off the Marquesas Keys.

Under the terms of each contract, Treasure Salvors received seventy-five percent (75%) of the artifacts recovered. In addition, the State was to provide an on-site salvage field agent for the purpose of recordation of data, authenti-

cation, and scientific evaluation, JA 31, as well as the services of the State Underwater Archeology Laboratory for the purpose of archeological analysis and full-scale preservation technology. JA 25, 29, 35, 36. The salvage contracts on the Atocha site were exclusive, i.e., during the term of the contracts, no other contractor was allowed to salvage the site.

In return, the State was to retain twenty-five percent (25%) of the representative artifacts, JA 33, for the purposes of continuing study, examination and display. This arrangement was renewed three times, the last contract being entered into on December 3, 1974. In the interim, United States v. Florida, 420 U.S. 531 (1975), was decided, re-establishing the boundaries of the State of Florida for the purpose of the

Submerged Lands Act of 1953.

As a result of United States v. Florida, Treasure Salvors filed an in rem action in the United States District Court for the Southern District of Florida for possession and confirmation of title to the vessel Atocha. The State of Florida was not a party to that proceeding, the United States having intervened to claim ownership of the wreck under both the Antiquities Act, 16 U.S.C. §§431-433, and the Abandoned Properties Act. 40 U.S.C. §310. The District Court issued an Order of Final Judgement confirming Treasure Salvors' right to possession, Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, etc., 408 F.Supp. 907 (S.D. Fla. 1976). On appeal, the Court of Appeals for the Fifth Circuit affirmed. Treasure Salvors, Inc.

v. Unidentified, Wrecked and Abandoned Sailing Vessel, 569 F.2d 330 (5th Cir. 1978) (hereinafter Treasure Salvors I).

The Fifth Circuit expressly ruled:

> . . . We do not approve that portion of its [the District Court's] Order which may be construed as holding that Plaintiffs have exclusive title to and the right to immediate and sole possession of the vessel and cargo as to other claimants, if any there be, who are not parties or privies to the litigation.

Treasure Salvors I at 336.

The present case arose through ancillary process issued by the federal district court, Southern District of Florida, pursuant to the Court of Appeals' decision in Treasure Salvors I. The District Court issued a Warrant for Arrest In Rem on April 11, 1978, JA 40, directing the marshal to take possession of all artifacts from the vessel in the custody or control of the State of

Florida's Division of Archives, History and Records Management, located in the Northern District in the State Capital, Tallahassee. Florida filed an Emergency Petition for Writ of Prohibition or Stay on April 12, 1978, which was on that same day granted by the Fifth Circuit. (R 368).

On May 15, 1978, the Circuit Court of Appeals dissolved its Emergency Stay. JA 65. The Court remanded back to the District Court for a determination of jurisdiction. JA 69. On August 21, 1978, the District Court entered final judgment in behalf of the plaintiffs, JA 84, and directed the State of Florida to relinquish possession of the artifacts to Treasure Salvors, Inc. Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 459 F.Supp. 507 (S.D. Fla. 1978).

The Court of Appeals affirmed the decision of the District Court as to jurisdiction over the State on July 24, 1980 (Rubin, J. dissenting). In re: State of Florida, Department of State v. Treasure Salvors, Inc., 621 F.2d 1340 (5th Cir. 1980). JA 98. Florida's Petition for Rehearing en Banc was denied October 16, 1980, and the mandate issued on October 24, 1980. JA 4. The State filed its Petition for Writ of Certiorari to the Court of Appeals for the Fifth Circuit on January 13, 1981, and the United States Supreme Court granted certiorari on May 18, 1981. JA 4.

SUMMARY OF ARGUMENT

I.

The Court of Appeals' holding in this case departs significantly from the standards that have been announced by

this Court to govern application of the constitutional guarantee of sovereign immunity under the eleventh amendment. The factual record before the Court presented a local question involving a dispute between the State of Florida and one of its citizens, centering around the ownership of marine antiquities.

The eleventh amendment limits the power of the federal judiciary to enforce private actions against the states. Treasure Salvors, Inc. is a Florida citizen and its suit is against the State since the Division of Archives, History and Records Management is a component of the State.

Treasurer Salvors implicated the federal courts in a testing of title to the artifacts, then in the possession of the State. It was at the point in time

when the District Court attempted to adjudicate ownership that the State first asserted its claim in court. This involuntary assertion of a claim did not constitute a waiver of the State's eleventh amendment immunity.

By styling this action as an *in rem* dispute in admiralty, the Court attempted to accomplish indirectly what it could not accomplish directly: that is, taking jurisdiction over subject matter in the possession of the state government. Admiralty jurisdiction includes only maritime matters or subjects and may not be extended to non-maritime matters. But even if the matter were to be styled in admiralty, the eleventh amendment must still be taken into account when the state is a party.

Failing to recognize the underlying dispute as being one against the State of

Florida by a citizen of that State is, we submit, constitutional error that, if left to stand, will have grave consequences upon valid State concern for historic preservation.

In addition, the Court's refusal to apply the eleventh amendment to this case was made possible by a similarly misdirected interpretation of United States v. Florida, 420 U.S. 531 (1975) and 425 U.S. 791 (1976). The Report of the Special Master adopted in those decisions strongly indicates that the purpose of United States v. Florida and similar cases was to define with greater particularity the State's boundaries for purposes of the Submerged Lands Act and in no way attempts to preclude Florida's continuing acts of sovereignty within its constitutional and historical boundaries. What is more, even if the Master's Report in

United States v. Florida was correctly interpreted by the Courts below, the "mistake", if any, which it worked upon the parties' contractual relationship was a mistake of law, rather than of fact, which does not nullify a contract. This result is furthermore justified in view of the parties' having each fully executed and performed their contractual obligations by the time United States v. Florida was decided.

ARGUMENT

I. THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION PRECLUDES AN IN REM ACTION IN FEDERAL COURT WHERE THE PRIVATE PARTY SUIT AGAINST THE STATE HAS FAILED TO DEMONSTRATE WAIVER OF THE ELEVENTH AMENDMENT GUARANTEE OF SOVEREIGN IMMUNITY.

The issue presented to this Court evolves from an action brought in admiralty in which the Respondent--a private person--sought to recover historical artifacts in the possession and under the control of the State of Florida. As noted in the Court below, these artifacts had been recovered from the remains of a sunken Spanish galleon pursuant to salvage contracts with the State of Florida. In re: State of Florida, Department of State, v. Treasure Salvors, Inc., 621 F.2d 1340, 1343 (5th Cir. 1980) [hereinafter Treasure Salvors II]. Under the terms

of these contracts, the State received twenty-five percent of the artifacts recovered. The state's interest in these artifacts is a direct result of the State's concern for its rich cultural heritage. See generally, R. Burgess & C. Clausen, Gold, Galleons And Archeology (1976). Florida was the first state to specifically include underwater archeological resources in its antiquities legislation. Fla. Stat. §§ 267.01-267.08 (1965) replaced by Fla. Stat. §§267.011-267.14 (1979) (Appendix to Petition for Writ of Certiorari, A166-219); see also Note, Cultural Resources Preservation and Underwater Archeology: Some Notes on the Current Legal Framework and a Model Underwater Antiquities Statute, 15 San Diego L. Rev. 623, 654-60 (1978).

Nevertheless, the Court below held that the contracts at issue were the

result of a mutual mistake of fact; consequently they were invalid. Treasure Salvors II at 1344. The court therefore concluded that the suit was not a suit against the state in violation of the eleventh amendment. Id.

Petitioner contends that when the facts are examined dispassionately, the action becomes nothing more than a suit against the State of Florida by one of its citizens in federal court, in spite of the fact that the State has not waived immunity in action or in fact. It is, therefore, the State's position that by accepting this cause of action and ruling upon the substantive issue, the courts below acted in violation of the eleventh amendment to the Constitution of the United States. There is nothing in the record to suggest that the State has

consented to be sued in federal court for the recovery of property in its possession. The trial court, however, in an attempt to avoid the eleventh amendment, styled the action as an in rem proceeding in admiralty and concluded that although the State was a party to the action, the issue involved was the determination of title to the artifacts in the custody of the State's Division of Archives. Treasure Salvors, Inc. v. Unidentified and Abandoned Sailing Vessel, 459 F.Supp. 507 (S.D. Fla. 1978). The court issued its warrant for arrest in rem of all artifacts from the vessel Atocha (then in State possession) JA 40, and subsequently ordered the State to show cause why the property held by it should not be delivered into the custody of the court. JA 63. This action by the

lower court, in taking jurisdiction over the subject matter, was compounded by the Fifth Circuit Court of Appeals in a split decision, agreeing that the federal district court had jurisdiction to hear and decide the case. Treasure Salvors II at 1344-46. No matter how the court below attempted to disguise the issue, the fact remains that this action is an action brought against the State of Florida to recover property within the control and possession of the state. Such an action is a suit against the State in violation of the eleventh amendment.

A. ELEVENTH AMENDMENT APPLICABILITY IN ITS HISTORICAL CONTEXT

Even before the Constitution of the United States was ratified, the suability of a state was of major concern to the nation's founders. The judicial power of

the United States, as drafted at the Constitutional Convention, extended ". . . to controversies between a state and citizens of another state. . ." U.S. Const. art. III, §2. However, "it had been widely understood prior to ratification of the Constitution that [article III, section 2] would not provide a mechanism for making states unwilling defendants in federal court." Employees of the Department of Public Health and Welfare v. Department of Public Health and Welfare, 411 U.S. 279, 291-292 (1973) (concurring opinion). The apprehension of the then severely indebted states that these debts might be prosecuted in federal court formed a serious objection to that instrument. In attempting to allay the fear of the states, Alexander Hamilton reasoned that "[t]he contracts

between a nation and individuals are only binding on the conscience of the sovereign and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will." The Federalist No. 81 , at 549 (Cooke ed. 1961)(A. Hamilton). The suggestion that the provision allowed a citizen of one state to sue another state was also the subject of much discussion at the ratification conventions. James Madison responded that "[i]t is not in the power of individuals to call any state into court. The only operation it [the provision] can have, is that, if a state should wish to bring suit against a citizen, it must be brought before the federal court." 3 J. Elliott, The Debates in Several State Conventions on the Adoption of the Federal Constitution 533 (1876). The defenders of the new

Constitution thus put these fears to rest by assuring the delegates that state sovereign immunity would survive under article III.

Four years after the Constitution was adopted, the problem of the meaning of the provision was before the court in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793). In Chisholm, two citizens of South Carolina brought an original action of assumpsit in the Supreme Court against the State of Georgia. Departing from the framers' intent that states be immune from private suits, the court sustained federal jurisdiction, with each justice penning a separate opinion, based primarily upon a literal reading of article III, section 2. The people of each state, said the court, consented to the suability of their states in federal

court upon the adoption of the new Constitution. Id. at 433. The decision evoked such immediate adverse public reaction that within one year the eleventh amendment, the purpose of which was to overturn Chisholm, was proposed and passed in both Houses of the Legislature.[1] It was subsequently ratified in 1798. Since the Amendment explicitly excludes only suits against the State brought by citizens of another state, it remained for the Court to decide whether the provision was applicable to suits by a citizen against his/her own State.

[1] Hans v. Louisiana, 134 U.S. 1, 11 (1890). See Jaffe, Suits Against Governments and Officers, 77 Harv. L. Rev. 1, 20 (1963); Nowak, The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments, 75 Colum. L. Rev. 1414, 1430-41.

In Hans v. Louisiana, supra note 1, the plaintiff, a citizen of Louisiana, sued Louisiana to recover the proceeds from state-issued bonds, which were later repudiated by the Legislature. Plaintiff contended that the repudiation of the bonds was in violation of article I, section 10 of the Constitution, which provides that "no state shall. . .pass any law. . .impairing the obligation of contracts." Since the action arose under the Constitution, the plaintiff argued that the federal court had the power to adjudicate his claim. However, the Court queried, could it be supposed "that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a state to sue their own state in the federal courts, whilst the

idea of suits by citizens of other states, or of foreign states, was indignantly repelled?" Id at 15. This applicability of the eleventh amendment to suits against a state by it's own citizens has been construed repeatedly by the Supreme Court to cover such actions. See, e.g., Edelman v. Jordan, 415 U.S. 651 (1974).

Although Hans, as the first case sustaining a state's claim of immunity from federal suits brought by its citizens, did not ground immunity in the Constitution, nearly all of the cases which have relied upon Hans have tended to regard that immunity as a part of the eleventh amendment and thus Constitutional in nature. See, e.g., Employees of the Department of Public Health & Welfare v. Department of Public Health

and Welfare, supra, at 285 ; Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945); Ex parte Young, 209 U.S. 123, 150 (1908); Chandler v. Dix, 194 U.S. 590, 591 (1904).

B. THE STANDARDS FOR DETERMINING ELEVENTH AMENDMENT APPLICABILITY WERE IGNORED BY THE COURT IN TREASURE SALVORS II.

The history surrounding the Constitution and the rapid passage of the eleventh amendment demonstrates the high value which the framers and the states placed upon sovereign immunity. This value is exemplified by the Constitutional strength attached to the doctrine of sovereign immunity. Yet, this fact was seemingly overlooked by both the trial court and the appeals court in their eleventh amendment analyses of the issue as presented in Treasure Salvors II.

In Ford Motor Co., supra, at 462, the court enunciated a two-part test for determining the existence of eleventh amendment immunity from suit: 1) whether the action is against the state, and 2) if the action is against the state, whether the state consented to be sued. See also, Edelman v. Jordan, supra. Thus, once it is determined that the suit is against the state, the eleventh amendment would preclude federal jurisdiction over the action, Hans v. Louisiana, supra, at 3, provided the state had not consented to be sued. See also Parden v. Terminal Ry., 377 U.S. 184 (1964); Clark v. Barnard, 108 U.S. 436, 447 (1883).

As to part one of the Ford test, the general rule for determining whether a suit is against the sovereign was articu-

lated in Dugan v. Rank, 372 U.S. 609, 620 (1963):

> . . .a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the government from acting, or to compel it to act. (Citations omitted)

Id. at 620. Thus, whether a political entity is an arm of the state or a non-immune political subdivision "depends in part upon the nature of the entity created by state law." Mt. Healthy City School District v. Doyle, 429 U.S. 274, 280 (1977). The Florida Department of State is an entity, the nature of which directly involves the administration of matters under the domain of state law. Accordingly, the Division of Archives,

History, and Records Management of the Department of State is an operating unit of the sovereign and functions as an arm of the State to implement Florida State policy relating to the location, acquisition, protection and preservation of historic sites and properties as mandated by Fla. Stat. §267.061(2)(a)(1979). See J. Ray McDermott & Co. v. Department of Highways, 267 F.2d 317 (5th Cir. 1959); Savoy v. Kawasaki Motor Corp., 472 F.Supp. 1216 (E.D. Pa. 1979).

If a federal court has any question as to whether the action against the entity is in fact against the state for purposes of eleventh amendment immunity, Mr. Justice Reed indicated that a federal court must look to the law of the appropriate state for guidance. Ford

Motor Co., supra, at 463. Accordingly, the Florida Supreme Court, in Hampton v. State Board of Education, 90 Fla. 88, 105 So. 323, 326 (Fla. 1925), concluded that a suit involving a contract or property right of the State Board of Education with reference to property owned or held by the Board is in legal effect a suit against the State and cannot be maintained insofar as it affects property rights of the State or seeks to enforce a contract made by or for the State, unless the consent of the State is duly given. See also Louisville & Nashville Railroad v. Railroad Commissioners, 63 Fla. 491, 58 So. 543 (Fla. 1912); McWhorter v. Pensacola & Atlantic Railroad, 24 Fla. 417, 5 So. 129 (Fla. 1888).

The State of Florida is the real party in interest in this case, for not only is the preservation of its cultural heritage as a cross-roads and center of maritime commercial activity in jeopardy, but also the judgment, if in favor of Respondent, Treasure Salvors, Inc., would conclude the State by determining the State's rights. In deciding that a claimant to property might sue persons preventing him from obtaining possession of property, even though the possessors held the property on behalf of the state, the court in Tindal v. Wesley, 167 U.S. 204 (1897), reasoned that the action was not against the state within the meaning of the Constitution because the judgment would not conclude the state. Id. at 221. As succinctly stated by Judge Rubin, "Here the district court did

precisely what was implicitly forbidden by Tindal: it concluded the state from claiming ownership of the property." Treasure Salvors II at 1351 (Rubin, J. dissenting).

At issue in the present case is both a contract and property right of the State of Florida to the artifacts previously in its possession (now in the hands of Treasure Salvors Inc.). This controversy, which seeks to affect the property rights of the State of Florida to its artifacts, falls explicitly within the holding in Hampton. It also is encompassed within the reasoning of Louisiana v. Jumel, 107 U.S. 711 (1882), which held that suits against state officers to recover, or direct the disposition of, property in the possession of the state are generally regarded as suits against the state within the pro-

hibition of the eleventh amendment. Thus supported by both rationales, the present cause of action is clearly against the State of Florida, without whose consent such suit cannot be maintained in federal court. See also Scheuer v. Rhodes, 416 U.S. 232, 237 (1974); Governor of Georgia v. Madrazo, 26 U.S. (1 Pet) 110 (1828).

The second part of the Ford test, (whether the state has consented to be sued) grew out of a concern for the prevention of interference with the performance of governmental functions and control over its instrumentalities, funds, and property. Great Northern Insurance Co. v. Read, 322 U.S. 47, 53-54 (1944); United States v. Lee, 106 U.S. 196, 206 (1882). This policy acknowledges the importance of the state's ability to

function efficiently and in the best interest of the public as a whole, which can be severely circumscribed if the state is continually forced to litigate suits brought by its citizens in federal court.

Such a hazard is depicted in the present fact situation. Treasure Salvors, Inc., grounding its cause of action on admiralty jurisdiction, sought an adjudication of ownership of the artifacts in the possession of the State of Florida in federal court. As noted by Judge Rubin in dissent below, Treasure Salvors II involves essentially a contract dispute--a "purely local question"--and hardly an appropriate subject for admiralty jurisdiction. Treasure Salvors II at 1351 (Rubin, J. dissenting). To adopt the position of

the majority below and permit a citizen to recover property from the state so long as an implied admiralty issue exists, would work a devastating effect on states with extensive coastlines, since it would eliminate from state adjudication a multitude of issues over which federal jurisdiction was not meant to extend. Such action by the Court below totally ignores its prior decisions which directly hold that a state may invoke its eleventh amendment defense in admiralty actions. J. Ray McDermott & Co. v. Department of Highways, 267 F.2d at 318; Intra Coastal Transportation, Inc. v. Decatur County, Georgia, 482 F.2d 361 (5th Cir. 1973); Platoro Ltd., Inc. v. Unidentified Remains of a Vessel, 508 F.2d 1113 (5th Cir. 1975). Accord, Red

Star Towing and Transportation Co. v. Department of Transportation, 423 F.2d 104 (3rd Cir. 1970); Sehlmeyer v. Romeo Co., 117 F.2d 996 (9th Cir. 1941).

The appeals court's reliance on the genre of cases allowing it jurisdiction to determine jurisdiction, and thus deciding a suit over state-claimed property on its merits, disregards the fact that a state may invoke its eleventh amendment defense in admiralty. According to Judge Rubin, this is "equivalent to asserting that suits against a state are permitted by the eleventh amendment if the result is that the state loses." Treasure Salvors II at 1351 (Rubin, J. dissenting).

The interest of an efficient government would be jeopardized if claims only tangentially or impliedly supporting

federal jurisdiction were sustained. To allow a federal court to adjudicate, without more, a purely local question would not only interfere with the responsibilities and functions of the state with regard to historic preservation, but would also be a drastic erosion in the state/federal dichotomy, a notion upon which this nation was founded.

Petitioner does not mean to imply that this strong government interest should be followed in a myopic fashion to bar every action which causes undue interference with the operations of government. Cases involving individuals who have suffered an invasion of their rights by state officials acting under an unconstitutional statute or in excess of their statutory authority have been per-

mitted to adjudicate those rights in federal court. Ex parte Young, 209 U.S. 123 (1908); Georgia Railroad & Banking Co. v. Redwine, 342 U.S. 299 (1952).

The interests of the individuals in such actions are weighed heavily in their favor, as it seems illogical to allow the government to claim that its governmental functions are being unduly interfered with when the exercise of the function complained of is either unconstitutional or unsupported by statutory authority. Although these cases have recognized an exception to the eleventh amendment, no identifiable exception is at issue in the present case. Treasure Salvors, Inc. asks merely for a determination of ownership to the artifacts in the possession of the State of Florida. Treasure Salvors II at 1341.

As both federal and state governments expand their scope of activities through enlarged and additional agencies, states are facing a dramatic increase in the number of litigants who are attempting to utilize federal courts, seeking remedies against states or their agents. See Note, A Practical View of the Eleventh Amendment--Lower Court Interpretation and the Supreme Court's Reaction, 61 Geo. L.J. 1473 (1973). The mere litigation of these suits creates a burden on the state--a fact to be considered when the potential interference with governmental functions is examined in the determination of whether the suit is in fact one against the state. As stated in Read,

> A state's freedom from litigation was established as a constitutional right through the Eleventh Amendment. The inherent nature of sovereignty prevents action against a state by its own citizens without its consent.

322 U.S. at 51. This consent is not derived from the Constitution or laws of the United States, but exists only upon the consent of the state. Palmer v. Ohio, 248 U.S. 32, 34 (1918).[2]

The traditional approach to waiver of eleventh amendment immunity, and one consistently adhered to by this court, is that waiver can be shown only "by the

[2] "Waiver" and "consent" are seemingly used interchangeably. See, e.g., Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459 (1945). It would appear that "consent" would be used to indicate expressed permission, whereas "waiver" would apply to cases of implied consent.

most express language or by such overwhelming implication from the text [of the state statute or Constitution] as would leave no room for any other reasonable construction." Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909); Edelman v. Jordan, 415 U.S. at 673. This approach gives effect to the states' authority to grant or withhold consent, as determined according to state, not federal, law. Ford Motor Co., supra. As noted earlier, the Florida courts have adopted the Read rationale of sovereign immunity and waiver; also, in a vein similar to Murray, the Constitution of Florida has been interpreted to require that unambiguous statutory language be used in order to effect a waiver of sovereign immunity. Manatee County v. Town of Longboat Key, 265 So.2d

143 (Fla. 1978).

Notwithstanding that the Florida Constitution authorized the legislature to waive sovereign immunity, Fla. Const. art. 10, §13 (1979), the legislature has not so declared with regard to suits in federal courts to recover property of the state.

Section 69.041(b), Fla. Stat. (1979), referred to by the trial court in dicta, provides that Florida may be sued in state or federal courts "[f]or the foreclosure of a mortgage or other lien on real or personal property on which the state has or claims a mortgage or other lien". The statute is not a waiver of Florida's eleventh amendment immunity from suits filed in federal courts to recover property of the state. In view of the mandate handed down in Edelman v. Jordan, supra, at 673, a

statute which purports to waive sovereign immunity must be strictly construed. To appropriate the statute's terminology as the trial court did so as to include a suit to recover property of the state under the guise of a salvage lien, is a misapplication of the statute in direct contravention to Edelman and ignores the "express language" requirements set forth in Murray and Manatee County, supra.

The State of Florida has not claimed a mortgage or other lien on the artifacts, as claimed by the trial court, but has asserted ownership of them. The statute has rightfully been interpreted to be a lien statute only, Seaside Properties, Inc. v. State Road Department, 121 So.2d 204 (3d D.C.A. Fla. 1960), and so, without a claim of lien by the state, the statute cannot be con-

strued to waive Florida's eleventh amendment immunity. This controversy involves a testing of title to cultural/historical resources, which is a local question governed by State law. Thus, since the matter at issue has been reserved to state adjudication, the lower court erred in permitting Treasure Salvors, Inc. to summon the State into federal court.

C. THE COURT OF APPEALS MISAPPLIED THE IN RE NEW YORK COMPANION CASES.

In affirming the trial court, the Appeals Court in Treasure Salvors II developed three major arguments for federal jurisdiction: 1) Although the eleventh amendment is applicable to admiralty in rem actions, its effect is merely to create a rebuttable pre-

sumption which, if defended, does not bar federal jurisdiction; 2) such jurisdiction, based upon a determination of the merits of a case, is sanctioned by the "jurisdiction to determine jurisdiction" line of cases; and 3) this approach is favored by the fact that federal courts have exclusive jurisdiction over admiralty in rem proceedings.

As to the first argument of the court, it must be urged that the eleventh amendment does apply when, as in this case, a plaintiff attempts to sue his/her state in federal court. Hans v. Louisiana, 134 U.S. at 3; North Carolina v. Temple, 134 U.S. 22, 30 (1890). The eleventh amendment also applies to maritime cases. See In re New York, 256 U.S. 490 and 256 U.S. 503

(1921). The majority opinion would, however, establish a novel theory of Constitutional law, stating that the eleventh amendment merely creates a rebuttable presumption in favor of the state, defeasible upon the introduction of facts which, if believed, would support a finding in favor of the plaintiff. The plaintiff, so the reasoning goes, must contend that the state has no real interest in the case since the property or other right asserted by the state is actually the property of the plaintiff. This argument obviously begs the jurisdictional question in the most fundamental way, since it merely reasserts the plaintiff's position on the merits. The majority is apparently extrapolating from Ex parte Young, supra, without saying so.

That case employed the legal fiction that a state cannot order its officer to perform an unconstitutional task; thus, a suit under the fourteenth amendment against such an official would not be barred by the eleventh. There is a wide gulf between Young's statement that an official cannot officially perform an unconstitutional act and the proposition that a state cannot assert a losing claim in contract. Judge Rubin's position, that the eleventh amendment is a constitutionally created irrebutable presumption, is far more reasonable and in keeping with case precedent and Constitutional history.

The majority justifies its position by citing the In re New York companion cases, supra. Both actions arose from a

maritime disaster on the Erie Canal involving tugboats operated by the State of New York. The first case involved a tug leased by Edward Walsh in his capacity as Superintendent of Public Works for the State of New York; the jurisdiction was in personam. The Supreme Court of the United States, in dismissing the suit for want of bonafide jurisdiction, stated:

> That a state may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this Court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given.

In re New York, supra, at 497.

The companion case, In re New York, 256 U.S. 503 [hereinafter The Queen City], involved a tug owned by the State, in which jurisdiction in rem was based upon a libel in admiralty against the tug itself. New York's Attorney General asserted that the tug was the property of the State and that the suit was therefore barred by the eleventh amendment. The plaintiff countered that the tug was not State property but offered no evidence to that effect (other than that the record and proceedings in the court below did not reveal any official documents proving it). The Court found that the Attorney General's affidavit established the State's possession without any need for further verification and, thus, held that the eleventh amendment prohibited the federal court from exercising jurisdic-

tion over the subject matter.

The majority in Treasure Salvors II opines that it can be inferred from The Queen City that had a genuine controversy as to the ownership of the tug been presented, the Court would have been obliged to decide the question. Then, if the Court in The Queen City had determined that the property did not in fact belong to the State, it would have been justified in concluding that since New York had no genuine interest in the case, the eleventh amendment would not have been applicable. Treasure Salvors II, supra, at 1345.

As Judge Rubin points out however, merely to accept the State's affidavit of ownership, absent a special challenge, does not imply that a controverted claim justifies federal jurisdiction. Id. at

1351 (Rubin, J. dissenting). Judge Rubin is correct: the court in The Queen City did not speak in terms of presumptions. Since presumptions have independent evidential significance, to accept such an interpretation would constitute an alteration of the law beyond that which was intended.

Treasure Salvors II further expanded the holding of The Queen City when the majority construed the presence of the controverted claim in the matter before it to be the "special challenge" envisioned by the Court in The Queen City which would "operate to rebut the presumption of validity attributed to the state's ownership claim." Treasure Salvors II, supra, at 1345. The Queen City in no way articulated the circumstances which would constitute "special

challenge" or the effect of the presence of a special challenge on the state's claim, should such a challenge have been advanced. Hence, the Court below misconstrued The Queen City when it interpreted that the presence of a special challenge operated to rebut the presumption of validity attributed to a state's ownership claim. The opinion in The Queen City makes reference only to the uncontroverted claim at issue. The opinion is devoid of language which would support the converse reasoning adopted by the Court of Appeals in Treasure Salvors II: that is, if a challenge to state ownership is present, the controversy ipso facto becomes an appropriate subject for admiralty jurisdiction.

In accepting the state's suggestion of ownership, the Court in The Queen City

noted that "[i]t would be an unwarranted aspersion upon the honor of a great state to treat facts thus solemnly certified by its chief officer. . .as now requiring verification." The Queen City, supra, at 509. The court's reliance stemmed from the suggestion of ownership coming through official channels, rather than from private counsel appearing as amici curiae, as was the case in In re Muir, 254 U.S. 522 (1921). The facts in the present case would similarly support such confidence and credence as the State of Florida's assertion of ownership also came through official channels.

The conclusion reached by the Court in Treasure Salvors II is in error and is an illogical completion to the syllogism, unsupported by The Queen City. Further-

more, such a result is irreconcilable with the essence of the eleventh amendment, particularly when, as here, the determination of ownership of the artifacts involves the adjudication of an underlying contract dispute between a citizen of Florida and the State itself, "a purely local question." Treasure Salvors II at 1351 (Rubin, J. dissenting). What is more, as noted by Judge Rubin, neither of the cases known as In re New York, supra, holds that a state can be brought involuntarily into an admiralty court for an adjudication of its property rights. Id. at 1350 (Rubin, J. dissenting). The facts of the instant case reveal that the claim asserted by the State of Florida was not voluntary, but was made merely to demonstrate the existence of a dispute and only in re-

sponse to the trial court's attempt to adjudicate the ownership of the artifacts. The litigation was not initiated by the State, which asserted its claim to the artifacts involuntarily and pursuant to a warrant for arrest in rem.[3] Since the conduct of the State on this latter point was not voluntary and was buttressed by the holding in Ford Motor Company,

[3] The trial court in the present case held that the Division of Archives waived the right to claim immunity from suit under the eleventh amendment by asserting its claim on the merits. This ignores Ford Motor Co., 323 U.S. at 467, which stated:

> The Eleventh Amendment declares a policy of such compelling force that this court will consider the issue arising under this Amendment even though urged for the first time in this court. (emphasis supplied)

supra note 3, at 55, the State did not waive its eleventh amendment.

Although not relied upon by the majority in Treasure Salvors II, Tindal v. Wesley, 167 U.S. 204, (1897) employed a rationale similar to the one advanced by Petitioner. In Tindal, the plaintiff claimed that the defendant was wrongfully withholding from him property which he owned in Columbia, South Carolina, The defendant asserted that he was holding it on behalf of the State of South Carolina and that the court's jurisdiction was accordingly precluded by the eleventh amendment. The court determined that since the State was not an actual party to the action (having declined to intervene) and since the State would not be bound by the de-

cision, the eleventh amendment was not applicable.

The Tindal determination, like that in The Queen City, was a bonafide jurisdictional decision and not a sneak attack on the merits. The principle actually extractable from the above predecents is that a federal court may initially investigate a claim of state involvement to ascertain whether a state is genuinely being sued in a particular case. But once the State's presence is discovered, the suit must be dismissed for want of jurisdiction.[4] Treasure Salvors II

[4] See, e.g., Cunningham v. Macon & B. R.R., 109 U.S. 446, 451 (1883)(involving a claim against state railroad property) wherein the Court stated, "[W]henever it can be clearly seen that the State is an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction."

would, however, require the state to first prove its case rather than merely demonstrate that it has a genuine case, before federal jurisdiction is barred by the eleventh amendment. As Judge Rubin argued, this concept stretches the principle completely beyond recognition, allows the proverbial exception to swallow the rule, and thus emasculates the Amendment. Treasure Salvors II at 1351 (Rubin, J. dissenting). Under the majority's rationale, a state would be beyond federal jurisdiction only in matters in which it is able to prevail on the merits. This is no protection at all.

As to the second argument in Treasure Salvors II, the majority justifies proceeding to the merits by citing the so-called "jurisdiction to determine

jurisdiction" line of cases. The rationale is that if "the issue of jurisdiction is inextricably interwined with the merits of the controversy," Treasure Salvors II at 1345, the court may, in deciding jurisdiction, look to the merits. By so concluding, the court carried its analysis too far. Under the eleventh amendment, the state does not have to demonstrate a winning case, but rather a valid claim so as to show that it has a right to a be party. This burden should be no more than that required to overcome a motion for summary judgment. In other words, the state should be able to demonstrate a genuine controversy to which it is a party. If the eleventh amendment is to have any meaning at all, it would appear that the instant court 's rationale could even be extended

to quasi in rem actions or could plausibly include suits in which the state itself is the defendant. Once a state demonstrates its actual presence in a case, the federal court must then dismiss for want of jurisdiction.

In the present case, the warrant and show cause order were issued against the State of Florida. JA 40, 63. The issue on the merits was whether the State had property rights to artifacts in its Archives--that is, whether the contract to which the State was a party was valid. Clearly, the State was a party to and would be directly affected by the action. This is quite unlike either The Queen City or Tindal such that the court's need to even initially consider the question of jurisdiction becomes difficult to understand.

The majority in Treasure Salvors II

cites United States v. United Mine Workers, 330 U.S. 258 (1957) for the "jurisdiction to determine jurisdiction" proposition. In Mine Workers, the Norriss-La Guardia Act, 29 U.S.C. §101 (1932) forbade to federal courts jurisdiction over disputes involving labor unions and their officers against employers. When the United Mine Workers and its officers were cited for contempt, their defense was that the trial court did not have subject matter jurisdiction, that its judgement was void, and that they were therefore not in contempt. In upholding the fines against Mr. Lewis and the union, the Supreme Court held, in the alternative: 1) The Act was not intended to apply where the government, not a private employer, was operating an indus-

try (the President having taken charge of the mines pursuant to his authority in a national emergency); and 2) the District Court unquestionably had the power to issue a restraining order for the purpose of preserving existing conditions pending a decision upon its own jurisdiction". Id. at 290.[5]

The court emphasized that the trial court's action would be proper only "where . . . the subject matter of the

[5] Mine Workers, supra, is often cited in proceedings wherein a trial court is held to have inherent injunctive powers to preserve the status quo pending a later determination as to its jurisdiction. Chicago and N.W. Ry. Co. v. United Transp. Union, 422 F.2d 979, 984-85; Stewart v. Dunn, 363 F.2d 591, 598 (5th Cir. 1966); United States v. Thompson, 319 F.2d 665, 667-68 (2d Cir. 1963); Fong Sik Leung v. Dulles, 226 F.2d 74, 78 (9th Cir. 1955).

suit, as well as the parties, was properly before the Court" and "where the elements of federal jurisdiction were clearly shown." Id. at 294. Thus, the Court in Mine Workers carved out a genuine exception to the Act--an exception, moreover, which Congress could have subsequently altered had it so desired. This is quite different from the present case, which appears to alter the well-settled meaning of a fundamental Constitutional amendment without articulating any cogent rationale for such alteration.

Finally, the majority cites Nestor v. Hershey, 425 F.2d 504 (D.C. Cir. 1969). In Nestor, the District of Columbia Circuit Court considered Sec. 10(b)(3) of a 1967 Act, 50 U.S.C. § 460 (b)(3) (Supp. IV, 1965-1968) which pre-

cluded all preinduction federal review of selective service draft classifications. The Nestor Court cited Ostereich v. Selective Service Board No. 11, 393 U.S. 233 (1968) which held that where the right to a deferrment is absolute rather than a discretionary question of fact (as in conscientious objection), Congressional intent was not to preclude judicial review in federal courts. Thus, Nestor also involved the interpretation of Congressional intent which distinguishes it from Treasure Salvors II, involving the firmly established application of a Constitutional amendment. In Nestor, had Congress disagreed with the court's interpretation of its intent, it could have subsequently made its wording more explicit. Nestor also involved an issue of significant national interest

during a period of international crisis, and, thus, review by the federal courts was far more compelling than in the instant case.

The final justification offered by the majority in Treasure Salvors II is that, since federal courts have exclusive jurisdiction over admiralty in rem actions, there is a type of jurisdiction by necessity. It is true, as pointed out in Madruga v. Superior Court of California, 346 U.S. 556 (1954) in dicta, that in rem admiralty actions are the exclusive domain of federal courts. However, in rem admiralty jurisdiction was never intended to take precedence over the eleventh amendment.

Where there is an action against a state involving maritime matters, in personam jurisdiction is reserved to state courts under the savings to suit-

ors clause. 28 U.S.C. §1333(1) (1970). See Red Cross Line v. Atlantic Trust Co., 264 U.S. 109, 123-125 (1924); see also Gulf Offshore Co. v. Mobil Oil Corp., 49 U.S.L.W. 4920 (July 1, 1981). Justice does not require that a plaintiff have every procedural avenue open to him; rather, there must be some avenue open so as not to preclude one from his day in court. Indeed, The Queen City, so heavily relied upon by the majority, dismissed a maritime in rem case because federal jurisdiction was barred by the eleventh amendment.

D. THE STATE OF FLORIDA HAS A DUTY TO PRESERVE AND PROTECT ITS HISTORIC RESOURCES.

The action by Treasure Salvors, Inc. seeks to deprive the State of Florida of possession of historic artifacts--artifacts acquired as a direct result of the State's performance of its obligation to

acquire, preserve, and protect historic properties. See, e.g. Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978).

The Department of State, Division of Archives, History and Records Management, Bureau of Historic Sites and Properties is charged with the responsibility to:

> Locate, acquire, protect, preserve and promote the location, acquisition and preservation of historic sites and properties, buildings, artifacts, treasure trove, and objects of antiquity which have scientific or historical value or are of interest to the public, including, but not limited to, monuments, memorials, fossil deposits, Indian habitations, ceremonial sites, abandoned settlements, caves, sunken or abandoned ships, or any part thereof.

Fla. Stat. §267.061(2)(a)(1979). Since 1965, when Florida first expressed concern over underwater archeological re-

sources, eleven states have expressly included sunken shipwrecks within the protection of their antiquities legislation.[6]

Preserving cultural and historical resources has become a national policy in

[6] Ga.Code §40.813(a)(1978); Ind. Code §14--3--3--3-1(m)(Cum.Supp. 1980); La. Rev. Stat. Ann. tit. 41 §§1601 & 1605 (1974); Mass. Gen. Laws Ann. ch. 6 §§179-180 (1977); Miss. Code Ann. §39-7-9 (1972); N.C. Gen. Stat. §§ 121-22-121-28 (1981); R.I. Gen. Laws §§42-45.1-3 --42-45.1-4 (1977); S.C. Code §§54--7-210---54--7-280 (Cum. Supp. 1980); Tex. Civ. Code Ann. tit. 9 §§ 191.001--191.174 (Supp. 1979); Vt. Stat. Ann. tit. 22 §§701, 781-782 (1978); Va. Code §10-145.9 (Cum. Supp. 1980).

Other states, while not referring to sunken or abandoned ships, include submerged or underwater sites in their protection of archeological resources. See Alaska Stat. §§41.35.020 (1977); Colo. Rev. Stat. §24-80-401 (1973); Hawaii Rev. Stat. §§6E-2 & 6E.7 (1976); Me. Rev. Stat. Ann. tit. 27 §§371

the United States.[7] Indeed, this Court has long recognized that protection and preservation of historic landmarks is a proper governmental objective for the exercise of the power of eminent domain. United States v. Gettysburg Electric Railway, 160 U.S. 668 (1896); Roe v. Kansas ex rel. Smith, 278 U.S. 297 (1929).

and 373 (1969); Mich. Comp. Laws Ann. §299.51, 1929 P.A. 173, §1 as amended by 1980 P.A. 184 (1980); Minn.Stat. §§138.31 & 138.37 (1980); Or. Rev. Stat. §§273.705(a), 273.722, 273.728, 274.005(7), 274.025 (1979); Wash. Rev. Code §27.53.040 (1979); Wis. Stat. §§27.012(1)--27.012(9) (1975).

[7] See Note, Cultural Resources Preservation and Underwater Archeology: Some Notes on the Current Legal Framework and a Model Underwater Antiquities Statute, 15 San Diego L. Rev. 623, 654-60 (1978). See also National Historic Preservation Act of 1966, 16 U.S.C. §470 (1970), which declares: "The spirit and direction of the nation is founded upon and reflected in its historic past; ...the historical and cultural foundations of the nation

Most recently, the Court reart-iculated this premise in a case involving a city's use of the police power in order to effectuate landmark preservation, stating that "New York City's objective of preserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible governmental goal." Penn Central Transporatation Co. v. City of New York, supra, at 129; see also Maher v. City of New Orleans, 516 F.2d 1051, 1060-61 (5th Cir. 1975); A-S-P Associates v. City of Raleigh, 258 S.E.

should be preserved...in order to give a sense of orientation to the American people; [and] it is...necessary and appropriate for the Federal government to accelerate its historic preservation programs and activities, [and] to give maximum encouragement to agencies and individuals undertaking preservations [as well as] State and local governments."

2d 444, 449-51 (N.C. 1979); Figarsky v. Historic District Commission, 171 Conn. 198, 368 N.E. 2d 163, 169-70 (Conn. 1976); Opinion of the Justices to the Senate, 333 Mass. 783, 128 N.E.2d 557 (Mass. 1955).

The State of Florida submits that, under the auspices of Chapter 267, supra, a marine res with historical and cultural significance should not be granted any less protection than a historic building or landmark. It is unquestioned that the state's police power has been used to preserve and regulate the use of valuable resources necessary for the public welfare. Skiriotes v. Florida, 313 U.S. 69 (1941). The Court has also permitted states to regulate traditionally maritime activities so long as these regulations were related to essential state police

power interests. Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 442-43 (1960); Kelly v. Washington, 302 U.S. 1, 9-10 (1937).[8]

In another case upholding a state's exercise of its police power respecting maritime activities, the Court emphasized the absence of an express preemption of state action in the federal statute (oil spill regulations), and the inability of the federal law to fully address and remedy matters of legitimate concern to the state. Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973). It naturally follows, particularly since

[8] In each of these cases, had the states exceeded their police power authority, it cannot be doubted that the state courts stood ready and able to adjudicate citizens' claims. See, e.g., State of Fla., Dep't of Transp. v. Edward M. Chadbourne, Inc., 382 So.2d 293, 296 (Fla. 1980); State v. Millington, 377 So.2d 685 (Fla. 1979).

federal legislation was found not to apply to the Atocha in Treasure Salvors I, that the State of Florida's engaging in antiquities salvage with Treasure Salvors pursuant to Chapter 267 was a necessary and proper governmental function.[9]

In summary, eleventh amendment immunity, absent a finding that the state consented, has been recognized in numerous cases involving a suit in federal court by private parties against the state. The importance of the issue presented to this Court by Treasure Salvors II, however, transcends the State

[9] See Lawrence, State Antiquity Laws and Admiralty Salvage: Protecting Our Cultural Resources, 32 Miami L. Rev. 291 (1977).

of Florida's duty to preserve and protect its historic properties. The significance of this case lies in the fact that the Court below summarily withdrew from the states within the Fifth Circuit a fundamental constitutional protection. By ignoring the eleventh amendment argument presented by the State and considering the substantive claim of Treasure Salvors, Inc., the Court has intruded upon a constitutional guarantee still enforced by this Court and certainly not abrogated by the State of Florida.

II. THE ALLEGED MISTAKE OF FACT FOUND BY THE COURTS BELOW TO CIRCUMVENT THE ELEVENTH AMENDMENT WAS THE RESULT OF A MISINTERPRETATION OF UNITED STATES V. FLORIDA, WHICH DEFINED FLORIDA'S BOUNDARIES ONLY FOR PURPOSES OF THE SUBMERGED LANDS ACT.

Not only did the Court of Appeals misinterpret the eleventh amendment's

application to the present case, but it also ignored the Report of the Special Master adopted in United States v. Florida, 420 U.S. 531 (1975), as well as the decision itself, which established the State's boundaries, as between Florida and the United States, for purposes of the Submerged Lands Act only. The court, when it held that the Master's Report adopted in United States v. Florida, supra, effectively placed the Atocha outside Florida's boundaries, then concluded that the salvage contracts entered into between the State and Treasure Salvors were founded upon a mutual mistake of fact, and thus were null and void. Treasure Salvors II at 1349.[10] It was in this fashion that

[10] The State of Florida contends, on the other hand, that if there were a mistake at all, it was a mistake of law and not of fact. See discussion infra, at 104 et. seq.

the court decided that the eleventh amendment did not apply to the litigation, since the "land [and thus, the artifacts] never belonged to Florida." Id. at 1350.

It is Florida's position that although the Special Master's Report in United States v. Florida effectively placed the Atocha outside its boundaries as established for purposes of the Submerged Lands Act, that Act does not address non-natural resources, such as antiquities. Thus, the fully executed contract entered into between the State of Florida and Treasure Salvors, Inc. was valid and part of a continuing program of control over the salvaging of ancient shipwrecks within the State's historical and Constitutional boundaries.

A. THE REPORT OF THE SPECIAL MASTER IN UNITED STATES V. FLORIDA DOES NOT PRECLUDE FLORIDA'S CONTINUING ACTS OF SOVEREIGNTY WITHIN HER HISTORICAL AND CONSTITUTIONAL BOUNDARIES.

The contracts in dispute in Treasure Salvors II were entered into between the State's Division of Archives and Treasure Salvors, Inc. on the assumption that the Division exercised control over antiquities found within State boundaries as defined by Florida's 1968 Constitution. Fla. Const. art II, § 1 (1968). These boundaries were in effect in 1971, the year of the first salvage contract, and are the same as those claimed today. Fla. Const. art. II, §1 (1979).

The Atocha lay well within those boundaries, having originally been plotted by Treasure Salvors to lie within 2500 yards from a point at 24°31.5' North

Latitude and 82°50' West Longitude.[11]

Approximately one month after the last division of artifacts, in March 1975, the Supreme Court decided United States v. Florida, 420 U.S. 531, which affirmed the report of the Special Master, Albert B. Maris.[12] The Court

[11]Two later amendments to the location description were filed, subsequent to the District Court's decision below, the last amendment describing an area encompassing an axis from the initial point to a second point at coordinates 24°30' North Latitude and 82°15' West Longitude, a distance approximately 9500 yard from point to point, extending 2500 yards on each side of the axis. See Relevant docket entries, JA 3-4.

[12] A supplemental Report of the Special Master regarding the further determination of Florida's boundaries in Florida Bay was subsequently adopted in United States v. Florida, 425 U.S. 791, (1976).

of Appeals below interpreted that Report as:

> . . .rejecting Florida's ownership claim of submerged lands, including that part of the continental shelf on which the Atocha rests. The report established that Florida had never owned an interest in any of the lands involved in the case at bar.

Treasure Salvors II at 1343. The State contends that the Fifth Circuit misinterpreted the recommendations of the Special Master, disregarded portions of the Report which clearly recognized Florida's continuing right to exercise jurisdiction in the waters wherein the Atocha lies, and in so doing imputed motives that questioned Florida's good faith contractual transactions.

At the beginning of his Report dated January 18, 1974, in United States v.

Florida, No. 52 Original, the Special Master states:

> This proceeding involves the determination of the extent of the rights of the State of Florida, as against the United States, to the seabed and subsoil of the continental shelf seaward of its coastline on the Atlantic Ocean and the more precise determination than has heretofore been made of the extent of those rights seaward of its coastline in the Gulf of Mexico.

Report of Albert B. Maris, Special Master, United States v. Florida (No. 52 Original at 1, January 18, 1974) [hereinafter Master's Report].[13] He then summarizes the relief sought by the United States against the State of

[13]The Master's Report was received and ordered to be filed on February 19, 1974. United States v. Florida, 415 U.S. 905, (1974). It is frequently this date which is referred to in identifying this particular Report.

Florida as a decree "defining the seaward boundary of the submerged lands of the continental shelf in the Atlantic Ocean in which the State of Florida has rights to the natural resources and beyond which the United States has those rights." (emphasis supplied). Master's Report at 2. Relief sought by the United States with respect to Florida's rights to the seabed's natural resources in the Gulf of Mexico was also at issue in this Report. Master's Report at 36-47.

The State contends that the raison d'etre for United States v. Florida and the Master's Report adopted therein was the need for a determination of Florida's boundaries for purposes of the Submerged Lands Act of 1953, 43 U.S.C. §1301 et seq. Master's Report at 2-3. Certain subsubsidiary questions were required to

be decided, such as the location of the dividing line between the Atlantic Ocean and the Gulf of Mexico and the location of the State's 1868 constitutional boundaries; but the principal thrust of the Report is to determine the respective proprietary rights of the federal and state governments to the natural resources of the seabed adjacent to Florida's landward boundaries. Master's Report at 6, 11; see also United States v. Florida, 425 U.S. 791 (1976); 363 U.S. 121, 128-129 (1960); 364 U.S. 502 (1960). Thus, if there is a seabed dispute in the present case, that dispute is between the United States and the State of Florida and not between Florida and one of its citizens.

The Master's Report begins with the recognition that the Supreme Court's 1960 holding in United States v. Florida, 363

U.S. at 128 (with respect to Congress's approval of Florida's Gulf boundaries under the 1868 Constitution as being boundaries "heretofore approved" for purposes of the Submerged Lands Act) was also applicable to the Atlantic boundary claimed in the same Constitution. Master's Report at 7-8.[14] The Master next proceeded to note the changes in Florida's Constitutional boundaries, primarily the 1962 amendment[15] (following passage of the Submerged Lands Act), Master's Report at 11, 15, and concluded:

[14]The significance of the 1868 Constitution is that this was the constitution which Florida adopted in order to be readmitted to the Union following the Civil War, of which Congress had "approved" for purposes of the Submerged Lands Act. See 43 U.S.C. §1301(a)(2).

[15] Fla.Const. art.1 (1963).

> It necessarily follows that the State of Florida is entitled under the Submerged Lands Act, as against the United States, to title to and ownership of the lands beneath the navigable waters and the natural resources within such lands and waters seaward for a distance of three geographical miles, but no farther, along its entire Atlantic coastline as defined in that Act. (emphasis supplied)

Master's Report at 17.

Acknowledging that the Submerged Lands Act grants Florida rights in the seabed of up to three leagues in the Gulf of Mexico and three miles in the Atlantic Ocean, the Master then determined the dividing line between those two bodies of water, Master's Report at 18 et seq.; and next, the exact location of the 1868 State boundaries. Master's Report at 21 et seq.

This particular portion of the

Master's Report lends even more support to Florida's argument that it may continue its acts of sovereignty within boundaries wherein the Atocha lies, so long as such acts do not conflict with the purposes of the Submerged Lands Act, because the Master interprets the 1868 boundary such that the Atocha lies well within the mark. Master's Report at 24; see also Master's Appendix at 84 (Section of Coast and Geodetic Chart C.&G.S. 1113, attached to Master's Report).

The Master finally proceeds, in Section B(6) of his Report, to his central task: "the location of the present State boundaries for purposes of the Submerged Lands Act." Master's Report at 32. He states:

> The findings which I have made with respect to the precise location of the boundary line of the State of Florida as

described in its 1868 Constitution have been made at the request of the parties. As I have already pointed out, however, the Submerged Lands Act of 1953 expressly authorized the State to extend its existing boundary in the Atlantic Ocean a full three geographical miles seaward from its Atlantic coastline. The Florida Act of May 31, 1955 and its 1962 Constitutional amendment took advantage of this statutory authority to extend out to the three-mile limit those portions of its Atlantic coastal boundary which lie along the coast or within three miles of it. Being thus expressly authorized by the Submerged Lands Act, this revised Atlantic coastal boundary is the boundary on that coast approved by Congress within the meaning and for the purposes of the Act, and is, therefore, in my opinion the only Atlantic coastal boundary which is of any significance in this proceeding. A further seaward extension of the north- ern section of the Atlantic

> coastal boundary purporting to have been made by the Florida revised Constitution of 1968 does not meet the definition of the Submerged Lands Act and has not been approved by Congress. It is, therefore, of no significance in determining the issues involved in this proceeding. (emphasis supplied)

Master's Report at 32-33.

The State contends that this language squarely indicates that the Special Master's focus and primary concern was Florida's boundary as contemplated in the Submerged Lands Act. The Master neither discounts nor disapproves Florida's boundaries for other purposes; he simply states that whatever boundary Florida may have historically claimed, or whatever boundary it may claim in the future, is of no significance as concerns the United States' seabed grant of natural resources authorized by the Submerged Lands Act.

The Report acknowledges the changes made by the 1968 Constitution and concludes that they are irrelevant for purposes specifically defined in the Submerged Lands Act. That portion of the 1968 Constitutional boundary (which is of significance to the Atocha's resting place) proceeds as follows (beginning at the northernmost point on Florida's east coast):

> [from the middle of the St. Mary's River]. . .to the Atlantic Ocean; thence due east to the edge of the Gulf Stream or a distance of three geographic miles whichever is the greater distance; thence in a southerly direction along the edge of the Gulf Stream or along a line three geographic miles from the Atlantic coastline and three leagues distant from the Gulf of Mexico coastline, whichever is greater, to and through the Straits of Florida and westerly, including the Florida reefs, to a point due south of and three

> leagues from the southernmost point of the Marquesas Keys; thence westerly along a straight line to a point due south of and three leagues from the Loggerhead Key, the westernmost of the Dry Tortugas Islands; . . . (emphasis supplied)

Fla. Const. art. II, §1 (1968).

Thus, not only does it become apparent that the Atocha lies within boundaries historically claimed by the State of Florida, but the Master goes on to unequivocally distinguish Florida's boundaries for purposes of the Submerged Lands Act from its boundaries for other purposes. He acknowledges that under both the 1868 and 1962 Constitutions, "the State boundary is described as extending to and around the Dry Tortugas Islands." Master's Report at 33 (emphasis supplied). He then deduces that the historical (and present)

boundary includes the large area of open water between the Marquesas Keys and the Dry Tortugas (in which the Atocha lies) which is more than three geographical miles or even three marine leagues from the coastline of either group of islands. The Master then states:

> Accordingly, the area of open water in the Atlantic Ocean more than three miles from the coastlines of the Marquesas Keys and the Dry Tortugas Islands and in the Gulf of Mexico more than three leagues therefrom cannot be included within the boundaries of the State of Florida for the purposes of defining the grant of the seabed and its resources made by the Submerged Lands Act. Whether this area of open water between the Marquesas and the Dry Tortugas may be considered to be within the boundaries of the State for other purposes is not involved

> in this proceeding and need not now be decided. (emphasis supplied)

Master's Report at 33-34; see also Master's Report at 30. The Master continues:

> The Dry Tortugas Islands are a part of the territory of the State of Florida. They were included within the State boundary described in the State Constitution of 1868 which, as we have seen, was approved by Congress in 1868 and their status as Florida territory has never been questioned. But for the purposes of the State boundary recognized by the Submerged Lands Act these islands must be regarded as constituting detached insular territory of the State with a separate boundary of their own. (emphasis supplied)

Master's Report at 34-35.

It is obvious from the above that the "mistake of fact" which the Court in Treasure Salvors II found to have invalidated the salvage contract was the

result of an erroneous reading of the Master's Report in United States v. Florida. The waters within which the Atocha's archaeological remains were found had historically been claimed by the State of Florida, which in this instance sought to protect one of its most fragile cultural resources, the vestiges of the Spanish colonial fleets as they wended their way through Florida's treacherous reefs before striking across the Atlantic and back to the Old World.

B. THE DETERMINATION MADE BY THE FIFTH CIRCUIT AS TO THE APPLICABILITY OF UNITED STATES V. FLORIDA WAS ERRONEOUS.

The Submerged Lands Act, 43 U.S.C. §1301 et. seq., was passed in 1953 as a response to United States v. California, 332 U.S. 19 (1947), and its progeny.

See United States v. Louisiana, 339 U.S. 699 (1950); United States v. Texas, 339 U.S. 707 (1950). United States v. California in 1947 held that California did not have right of ownership in the resources underlying waters seaward of the mean low water line. The concern in that case was oil and the implications of its off-shore development for national defense:

> As a matter of fact, the record plainly demonstrates that until the California oil issue began to be pressed in the thirties, neither the states nor the Government had reason to focus attention on the question of which of them owned or had paramount rights in or power over the three-mile belt.

332 U.S. at 31.

This decision was subsequently limited by the Court in United States v. Louisiana, in 1950. There, the Court stated, with regard to claims beyond the

three-mile limit:

> We intimate no opinion on the power of a State to extend, define, or establish its external territorial limits or on the consequences of any such extension vis a vis persons other than the United States or those acting on behalf of or pursuant to its authority. (emphasis supplied)

339 U.S. at 705; see also Oregon ex rel State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363, 371 n.4 (1977).

This decision is significant with regard to the present litigation in that the Atocha rests in waters historically claimed by Florida which are outside the three mile belt. See discussion, supra. Thus, from the start, the Atocha-type situation was excluded from the scope of United States v. California.

The decision in United States v. California created concern that perhaps

the riparian states could better supervise the development of oil resources. The resulting legislation, The Submerged Lands Act of 1953, supra, "returned" to the affected states the ownership of off-shore natural resources found within three miles of the coastline (three leagues in the Gulf of Mexico).

The legislative history of the Act demonstrates that oil was the primary concern in its passage:

> In this almost interminable debate over the disposition of these submerged lands, one area of agreement shines like a beacon in this sea of debate--that is the acute and vital necessity of the immediate enactment of legislation to promote the exploration and development of the petroleum deposits known to be located in these areas.

H.R. Rep. No 215, 83d Cong., 1st sess. 2, reprinted in [1953] U.S. Code Cong. & Ad. News 1386.

Indeed, the Act refers only to natural resources:

> It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located and respective grantees, lessees, or successors in interest thereof; . . .

43 U.S.C. §1301(a); and it defines them as follows:

> The term "natural resources" includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp

> and other marine animal and plant life but does not include water power, or the use of water for the production of power; . . .

43 U.S.C. §1301(e).

Neither the Submerged Lands Act nor its companion legislation, the Outer Continental Shelf Lands Act, 43 U.S.C. §1332(a)(2) (extending federal resource jurisdiction to the "subsoil and seabed" outside the three mile/three league belt) vest regulatory power in federal or state sovereigns over non-natural resources, such as marine antiquities.[16] What is more, judicial construction has implied that neither Act is applicable to underwater cultural resources. See, e.g., United States v. Maine, 420 U.S. 515, 527-28 (1975); United States v.

[16] See Lawrence, State Antiquity Laws and Admiralty Salvage: Protecting Our Cultural Resources, 32 Miami L. Rev. 291, 321 (1977).

California, 381 U.S. 139, 148-49 (1965); United States v. Louisiana, 363 U.S. 1, 5 (1960); State v. Bundrant, 546 P.2d 530, 545-47 (Alaska 1976) appeal dismissed, 429 U.S. 806 (1976).

Upon the passage of both Acts, profuse litigation ensued to determine the location of the boundaries dividing the federal interest from that of the various coastal states. This court determined at the outset that: 1) It was the intent of Congress to allow judicial determination of the precise boundaries under the Submerged Lands Act; and 2) the Geneva Convention on Territorial Waters and the Contiguous Zone was the authoritative source for making that determination. United States v. California, 381 U.S. 139, 150-67 (1965);

United States v. Louisiana, 394 U.S. 11, 30-51 (1969).

Florida, as a state with both Atlantic and Gulf of Mexico shores, was drawn into litigation surrounding the determination of boundaries in both waters. A Special Master was appointed and the causes were consolidated in United States v. Florida, infra. The Court's opinions in United States v. Florida, found at 420 U.S. 531 (1975) and 425 U.S. 791 (1976), contain within them limitations on the scope of the decision which conform to the general concern over ownership and development of natural resources:

> The case consolidates two proceedings. In the first, the United States seeks a decree defining the seaward boundary of the submerged lands of the continental shelf in the Atlantic Ocean in which Florida

has rights to the natural resources. 395 US 955, 23 L Ed 2d 743, 89 S Ct 2095 (1969). In the second, the State of Florida and the United States seek a decree defining more specifically than does the decree entered in United States v Louisiana, 364 US 502, 5 L Ed 2d 247, 81 S Ct 258 (1960), the seaward boundary of the submerged lands of the continental shelf in the Gulf of Mexico in which Florida has rights to the natural resources. 403 US 949, 29 L Ed 2d 861, 91 S Ct 2272 (1971). (emphasis supplied)

420 U.S. at 532 (1975); and:

As against the United States, the State of Florida is entitled to all the lands, minerals and other natural resources underlying the Gulf of Mexico extending seaward for a distance of 3 marine leagues from its coastline or its historic coastline, whichever is landward, but for not less than 3 geographic miles from its coastline; the United States is not entitled, as against the State of Florida, to any interest in such lands, minerals, or resources. (emphasis supplied)

425 U.S. at 792 (1976).

These clear references to "natural resources" place the decision in United States v. Florida in the line of cases which began with United States v. California, 332 U.S. 19, in 1947 and the Submerged Lands Act of 1953; that is, it falls into the category of decisions and legislation concerning the determination of the ownership of natural resources. Neither the Submerged Lands Act nor either of the 1975 and 1976 decisions in United States v. Florida makes any determination concerning the exercise of sovereignty over salvage operations on archaeological sites in waters historically claimed by the states. The location of the Atocha's remains is approximately three leagues southeast of the Marquesas Keys; this site is well

within any conceivable construction of the state's 1868 boundaries, and is in an area over which Florida has historically and logically exercised sovereign rights. Until the decision in United States v. Florida, neither of the parties to the salvage contract doubted that Florida had sovereignty over the waters in question; both performed fully under the contract. Since the wreck is not within the subject matter of the Act or any decision by the Court making determinations under the Act, it was error for the Fifth Circuit to utilize United States v. Florida to place the State within its jurisdiction over the strenuous assertion of eleventh amendment immunity.

The Atocha's remains are not a natural resource. They are historical

antiquities, a sample of which the State of Florida seeks to preserve for the benefit of present and future generations of Floridians and non-Floridians alike. It was not within the scope of the Submerged Lands Act to allocate the rights of sovereignty possessed by Florida in waters such as those between the Dry Tortugas and the Marquesas Keys. Rather, the Act was intended to make a division of interests in natural resources as between Florida and the United States only. Oregon ex rel State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. at 371. The Submerged Lands Act, and case law construing it, cannot and should not be used to determine sovereignty over cultural resources, or the validity of salvage contracts executed by a State with regard thereto.

C. THE COURT OF APPEALS INCORRECTLY APPLIED THE DOCTRINE OF MISTAKE OF FACT BECAUSE, IF A MISTAKE OCCURRED AT ALL, IT WAS A MISTAKE OF LAW, WHICH DOES NOT INVALIDATE A CONTRACT.

The Court of Appeals, citing the well-known case of Sherwood v. Walker, 66 Mich. 568, 33 N.W. 919 (1887), concluded that Florida had contracted with Treasure Salvors, Inc. upon the mistaken assumption that the Atocha lay within its territorial waters. Treasure Salvors II at 1349. The court, reading United States v. Florida to hold that the submerged land upon which the Atocha rested had never been owned by Florida, thus attempted to circumvent the eleventh amendment's bar to the proceeding.

As is obvious from the foregoing discussion, however, the mistake, if any, was a mistake of law and not of fact. Certainly, the Atocha did not move. The

"fact" of its resting place, for the duration of the parties' contractual relationship, remained as designated in the Complaint. JA 5. See also Salvage Contract "S-8-C", JA 20. What did change, at most, was the legal interpretation of its location relative to sovereign territorial control.

The Special Master in United States v. Florida, 420 U.S. 531 (1975) recognized that Florida had historically claimed a boundary inclusive of the waters between the Marquesas Keys "to and around" the Dry Tortugas Islands. Master's Report at 33; 30. The State of Florida, Department of State and Treasure Salvors, Inc., therefore, were contracting on the basis of the "law" as described in article II, §1 of the 1968 Constitution when they reached an agreement in April 1971.

The contract, renewed three more times, was fully executed and performed by the time the "law" allegedly changed with the decision in United States v. Florida, 420 U.S. 531, in March 1975. The mistake of law, if any at all, consisted of the Special Master's re-interpretation of Florida's territorial boundaries for purposes of another "law", the Submerged Lands Act of 1953.

It is hornbook law that a mistake of law is not grounds for rescission of a contract. Heath v. A. B. Dick Co., 253 F.2d 30, 35 (7th Cir. 1958). It has likewise been held that reformation of a contract will not be granted upon an alleged mistake of law, National Union Fire Insurance Co. of Pittsburg, Pennsylvania v. D. & L. Construction Co.,

353 F.2d 169, 174 (8th Cir. 1965) and neither will an estoppel. Dampskibs Aktieselskabet Thor v. Tropical Fruit Co., 281 F. 740, 742 (2d Cir. 1922).

The State of Florida thus urges that, although the Report of the Special Master did not preclude Florida's continuing exercise of her police power in the waters where the Atocha lies, any alleged mistake which could have affected the parties' understanding was a mistake of law and not of fact. Such a conclusion is particularly just since the contract was fully executed and performed by the time the action in the Courts below sought to take the artifacts out of the State's possession.

The Court, in its mistaken interpretation of United States v. Florida, compounded its error by misapplying

contract principles. Neither of these errors should be allowed to avoid the eleventh amendment's postulate that a state may not be sued in federal court without its consent.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX

FLORIDA CONSTITUTION (1868)

ARTICLE I

BOUNDARIES

The boundaries of the State of Florida shall be as follows: Commencing at the mouth of the river Perdido; . . . thence straight to the head of the St. Marys river; thence down the middle of said river to the Atlantic ocean; thence southeastwardly along the edge of the coast to the edge of the Gulf Stream; thence southwestwardly along the edge of the Gulf Stream and Florida Reefs to and including the Tortugas Islands; thence northeastwardly to a point three leagues from the mainland; thence northwestwardly three leagues from the land, to a point west of the mouth of the Perdido river; thence to the place of beginning.

FLORIDA CONSTITUTION (1963)

ARTICLE I.

BOUNDARIES

The state boundaries are: Begin at the mouth of the Perdido River, which for the purposes of this description is defined as the point where latitude 30° 16' 53" north and longitude 87° 31' 06" west intersect; . . . thence in a straight line to the head of the St. Mary's River; thence down the middle of said river to the Atlantic Ocean, and extending therein to a point three geographic miles from the Florida coast line, meaning the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters; thence southeastwardly following a line three geographic miles distant from the Atlantic coast

line of the state and three leagues distant from the Gulf of Mexico coast line of the state to and around the Tortugas Islands; thence northeastwardly, three leagues distant from the coast line, to a point three leagues distant from the coast line of the mainland;

* * *

The legislature may extend the coastal boundaries to such limits as the laws of the United States or international law may permit.

ARTICLE II

GENERAL PROVISIONS

SECTION 1. State boundaries.--

(a) The state boundaries are: Begin at the mouth of the Perdido River, which for the purposes of this description is defined as the point where latitude 30° 16' 53" north and longitude 87° 31' 06" west intersect; . . . thence in a straight line to the head of the St. Marys River; thence down the middle of said river to the Atlantic Ocean; thence due east to the edge of the Gulf Stream or a distance of three geographic miles whichever is the greater distance; thence in a southerly direction along the edge of the Gulf Stream or along a line three geographic miles from the Atlantic coastline and three leagues distant from the Gulf of Mexico coastline, whichever

is greater, to and through the Straits of Florida and westerly, including the Florida reefs, to a point due south of and three leagues from the southernmost point of the Marquesas Keys; thence westerly along a straight line to a point due south of and three leagues from Loggerhead Key, the westernmost of the Dry Torgugas Islands; thence westerly, northerly and easterly along the arc of a curve three leagues distant from Loggerhead Key to a point due north of Loggerhead Key; thence northeast along a straight line to a point three leagues from the coastline of Florida; thence northerly and westerly three leagues distant from the coastline to a point west of the mouth of the Perdido River three leagues from the coastline as measured on a line bearing south 0° 01'

00" west from the point of beginning; thence northerly along said line to the point of beginning. The State of Florida shall also include any additional territory within the United States adjacent to the Peninsula of Florida lying south of the St. Marys River, east of the Perdido Rover, and south of the States of Alabama and Georgia.

(b) The coastal boundaries may be extended by statute to the limits permitted by the laws of the United States or international law.

§ 1301. Definitions

When used in this chapter--

(a) The term "lands beneath navigable waters" means--

(1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;

(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast

line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles, and

(3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined;

(b) The term "boundaries" includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of the Great Lakes as they existed at the time such State became a member of the Union, or as heretofore approved by the Congress, or as extended or confirmed pursuant to section 1312 of this title

but in no event shall the term "boundaries" or the term "lands beneath navigable waters" be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico;

(c) The term "coast line" means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters;

* * *

(e) The term "natural resources" includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp,

and other marine animal and plant life but does not include water power, or the use of water for the production of power;

* * *

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No. 80-1348

IN THE

Supreme Court of the United States

October Term, 1980

STATE OF FLORIDA,
DEPARTMENT OF STATE, *Petitioner*

-vs-

TREASURE SALVORS, INC.,
ARMADA RESEARCH CORP., *Respondents.*

On Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

BRIEF OF RESPONDENTS

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QUESTION PRESENTED

Where property in custody of state employees is ordered seized in a maritime *in rem* proceeding by process from the federal district court, does the court, upon the assertion of the Eleventh Amendment by the State, have the power to determine as a jurisdictional fact whether the State is the owner and entitled to possession, and, if not, hold the Eleventh Amendment is no bar?

Note: The wording of Petitioner Florida's *two* Questions Presented neither accurately reflects the basis of the holding of the court of appeals below nor the *single* Question Presented in the Petition to which this Court granted Certiorari.

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No. 80-1348
IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980
STATE OF FLORIDA
DEPARTMENT OF STATE,
Petitioner,

—vs.—

TREASURE SALVORS, INC.,
ARMADA RESEARCH CORP.,
Respondents.
ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

Certiorari has been granted on the second of two appeals concerning the application of the Eleventh Amendment to the maritime seizure of certain articles of salvage recovered

from a wrecked Spanish galleon.* The Respondents, Armada Research Corp. and Treasure Salvors, Inc. (hereinafter Treasure Salvors), located the wreck of the *Nuestra Senora de Atocha* (hereinafter the *Atocha*) which was lost during a 1622 hurricane. (App.Pet.Cert. 8-17, 65). Treasure Salvors recovered thousands of articles of salvage of substantial value through an arduous, prolonged, and *still* continuing effort undertaken at great cost, including the loss of several lives. (App. Pet. Cert. 65-66). In general see documentary film of National Geographic Society, Exhibit 10, admitted R.v. IV 233.**

Beginning in 1968 Treasure Salvors started a physical search for the *Atocha* south of the Matecumbe Keys located midway from Miami to Key West. In addition to the search, Treasure Salvors initiated extensive research in the Archives

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**State of Florida Department of State v. Treasure Salvors, Inc. (Treasure Salvors II)*, 621 F. 2d 1340 (5th Cir. 1980), set out in *Appendix to Petition for Certiorari* (App. Pet. Cert.) 6-60, affirming, *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 459 F. Supp. 507 (S.D. Fla. 1978), (App. Pet. Cert. 61-163). The first appeal *(Treasure Salvors I) Treasure Salvors Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F. 21 330 (5th Cir. 1978) affirmed with modification *Treasure Salvors Inc. v. Abandoned Sailing Vessel*, 408 F. Supp. 907 (S.D. Fla. 1976).

**Transcript of the evidentiary hearing of July 27, 1978 is referred to as "R.v. III", transcript of July 28 as "R.v. IV"; on supersedeas bond, September 8, 1978 as "R.v. V."

of the Indes in Seville, Spain. The results of this research caused the physical search to be moved in 1970 to an area of ocean nearly forty miles west of Key West, Florida, where the wrecked vessel was eventually located on the outer continental shelf and salvage commenced. (App. Pet. Cert. 37). Treasure Salvors indicated by a letter sent in 1970 to agents of the State of Florida (R.v.III 55-57) that the area (in the Atlantic, approximately 11 miles west of the nearest land, the Marquesas Keys) was outside state boundaries. (R.v.IV 34-35).

Nevertheless after Mel Fisher, the President of Treasure Salvors and the leader of the expedition, had recovered a gold chain, agents of the State of Florida appeared and "threatened to put me [Mel Fisher] in jail, confiscate all my boats and magnetometers and stop me from working completely unless I had a salvage contract." (R.v.III 60-61). The trial court found that the contract signed on April 26, 1971 had been obtained by coercion and thus void. (App.Pet.Cert. 123). This finding was not challenged on appeal.

The salvage contracts, as authorized by Chapter 267*, Florida Statutes, were expressly predicated upon the wreck site being on sovereign submerged lands of the State. (J.A. 20-21); App.Pet.Cert. 126-127). Chapter 267 only authorized the State to contract with regard to salvage on sovereign bottoms. The contracts had various forfeiture provisions under which the Division of Archives, History and Records Management, Department of State of Florida (hereinafter State or Division), could claim the entire salvage. (App.Pet.Cert. 76). The State retained *all* items salvaged by Treasure Salvors during the salvage seasons of 1971 through

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* §267.061 (1) (b) . . . which have been abandoned on state-owned lands or state-owned sovereignty submerged lands shall belong to the state.

1975 and although repeated requests were made by Treasure Salvors to divide the salvage, the State refused. (App.Pet.Cert. 76). The contracts were renewable on an annual basis, but because of the forfeiture clause and the refusal of the State to divide the articles of salvage, Treasure Salvors had to renew the contracts or suffer total forfeiture of all articles of salvage recovered. (J.A. 38; App.Pet.Cert. 76). The trial court found that the State of Florida intended to keep *all* of the salvage, and this finding was not challenged on appeal. (App.Pet.Cert. 76).

After the Special Master's Report was filed in February, 1974 in *United States v. Florida,* 420 U.S. 531 (1975), determining the boundary line of State of Florida to be landward of the wreck site, Mr. Fisher suggested he would be willing to donate to the State a substantial portion of the salvage. Still the State refused any division and kept possession of the entire recovery. (App.Pet.Cert. 17,76, 77). It was only after the oral argument before this Court in February, 1975, that the State, apparently recognizing it could lose all, proceeded to divide the treasure (a few days prior to this Court's decision) and take its purported twenty-five percent share. (App.Pet.Cert. 77). Most, but not all of the articles of salvage recovered by Treasure Salvors and in possession of the State were divided. (Ex.9, R.v. IV 44-46). The salvage efforts of Treasure Salvors have continued.

Shortly after the announcement of the Supreme Court's opinion in *United States v. Florida,* which affirmed the Special Master's Report as to the location of Florida's boundaries and its lack of ownership of the submerged lands under and around the wreck site, Treasure Salvors instituted the *in rem* admiralty and maritime proceeding in the United States District Court for the Southern District of Florida, seeking confirmation of title to the *Atocha* and *all* articles of salvage recovered, as finders and, in the alternative, seeking a salvage award of the highest order. (J.A. 5-10; App.Pet.Cert. 17-18). Although both the United States and Florida had

notice of the proceeding, they negotiated and only the United States appeared. (App.Pet.Cert. 18-19, 74, 81, 90). The United States voluntarily submitted itself to *in personam* admiralty jurisdiction and claimed title, under the English rule of Sovereign Prerogative and the Federal Abandoned Property and Antiquities Acts, to *all* of the articles of salvage that had been recovered from the *Atocha,* including those now claimed by the State of Florida and the subject of the present proceedings. *Treasure Salvors I,* 569 F. 2d 330 (5th Cir. 1978).

Treasure Salvors was appointed substitute custodian of the articles of salvage arrested by the United States Marshal in the Southern District and continued to recover substantial articles of salvage from the *Atocha.* (App.Pet.Cert. 21n.15, 37n. 24).

The State of Florida closely monitored the proceeding, but chose not to formally intervene, inasmuch as it had negotiated with the United States to protect its claim to the salvaged articles in its possession. (App.Pet.Cert. 18-19, 74-75, 81-82). The trial court noted that the State, being frustrated in its scheme to obtain the entire treasure under its coerced contracts, encouraged the United States to claim ownership of the *Atocha* and articles of salvage, to the total exclusion of Treasure Salvors. (App.Pet.Cert. 77-78).

The United States District Court ruled against the various claims of the United States and held that Treasure Salvors had finders' title to the *Atocha* and all articles of salvage recovered therefrom against the United States and all the world, *Treasure Salvores vs. Unidentified Wrecked and Abandoned Sailing Vessel,* 408 F. 907 (S.D. Fla. 1976). The United States and Treasure Salvors recognized, and the court determined, that the wreck site was on the continental shelf in international waters outside the three mile boundary of the United States. *Treasure Salvors vs. Unidentified Wrecked and Abandoned Sailing Vessel,* 408. F. Supp. at 909. On appeal, the rejection of the claim of the United States was affirmed and title was upheld in Treasure Salvors as against the United States and *privies* to the litigation, but that

portion of the trial court's opinion that had granted title against the world was modified. *Treasure Salvors I,* 569 F. 2d 330 (5th Cir. 1978). This order of the court of appeals became final (the United States did not seek review in the Supreme Court.)

Following the issuance of the mandate from the Fifth Circuit in *Treasure Salvors I, supra,* the ancillary warrant of arrest in question was issued by the trial court to seize the articles of salvage in the custody of named employees of the Petitioner State of Florida. (J.A. 40; App.Pet.Cert. 19). The trial court expressly noted that the ancillary warrant of arrest and proceeding thereon were based upon the original complaint and *not* the supplemental Complaint for Declaratory Relief that was subsequently dismisssed. (App.Pet.Cert. 70, 147). The State filed a Motion to Quash the warrant of arrest in the district court and at the same time filed an Emergency Petition for Writ of Prohibition or Stay in the Fifth Circuit (J.A. 43; App.Pet.Cert. 20). The Fifth Circuit issued a temporary stay which was subsequently dissolved and denied the petition for prohibition. (J.A. 65; App.Pet.Cert. 20). The Fifth Circuit subsequently denied a Petition for Reconsideration filed by the State. (J.A. 69; App.Pet.Cert. 105). In denying the Petition for Reconsideration, the court stated that *the question of jurisdiction was initially for the trial court* to decide. (J.A.69;App.Pet.Cert.105). The trial court denied the Motion to Quash, but stayed execution temporarily, pending the outcome of the temporary stay in the Fifth Circuit and accordingly issued an Order to Show Cause under Supplemental Admiralty Rule C(5) (J.A. 51-64, 70-77; App.Pet.Cert. 20-21). The papers filed by the State in the Fifth Circuit did not raise the Eleventh Amendment issue, but this issue was asserted subsequently in the trial court in reference to the Order to Show Cause, together with an affirmative claim on the merits by the State to ownership of the articles of salvage in question. (J.A. 51; R.v. III & IV).

At the hearing on the Order to Show Cause, which is the matter now before this Court, the trial court afforded the parties a full evidentiary hearing on the jurisdictional issues and the merits, including the contention of the State of Florida that the proceeding was precluded by the Eleventh Amendment. (App.Pet.Cert. 21-22, R.v. III & IV). Judgment was entered in favor of Treasure Salvors. (J.A. 84-85; App.Pet.Cert. 21-22). The trial court summarized its extensive findings of fact and conclusions of law thusly:

> For the reasons that follow, this Court holds: it had jurisdiction to issue the warrant for arrest and seize the property in question; the Division of Archives is bound by the earlier judgment of this Court; Treasure Salvors, under the judgment of this Court, as affirmed by the Fifth Circuit, is the owner of the property and entitled to possession; the claims of the Division of Archives to be the owner of the property, and to be accordingly entitled to the possession of such, are wholly without merit; and the present proceedings are not barred by the Eleventh Amendment to the Constitution of the United States nor by the Doctrine of Sovereign Immunity.

(App.Pet.Cert.64).

The trial court's holding that the State of Florida was bound, as being in privity with the United States and for failure to intervene, by the previous ruling in *Treasure Salvors I,* was noted by the court of appeals, but it expressly declined to approve or disapprove the holding, "saving it for another day." (App.Pet.Cert. 23, n. 17).

In reference to the Eleventh Amendment, the trial court made several jurisdictional findings of fact including the finding that "the Division of Archives is not and never was the owner of the ship *Atocha,* her tackle, apparel, cargo, etc." (App.Pet.Cert. 150). The trial court further found that employees of the State of Florida had wrongfully taken and withheld possession of the articles of salvage. (App.Pet.Cert. 150).

The jurisdictional findings of the trial court were affirmed by the Fifth Circuit:

> In the case at bar, ownership of the salvaged items is determinative of both the eleventh amendment and the merits. Since we agree with the trial court's assessment that Florida lacks an ownership interest in the artifacts, *see* pp.1348-1349, *infra,* we affirm the judge's holding that the order to show cause is not, in this case, a suit against the state.

(App.Pet.Cert.29).

The dissenting opinion contended that once the State asserted a mere claim of ownership, jurisdiction of the federal court was barred by the Eleventh Amendment. (App.Pet.Cert. 54). The majority opinion affirmed the holding of the trial court that the question of ownership was a jurisdictional fact that, being in dispute, should be determined by the court. (App.Pet.Cert. 28).

Florida's claim of ownership was predicated upon Chapter 267 of the Laws of Florida which expressly required the salvage to be on state-owned sovereignty submerged lands. (App.Pet.Cert. 126-127). The trial court specifically found the wreck site *not* to be on Florida sovereignty submerged lands. The court stated:

> The portion of the *res* seized under the warrant of arrest was comprised of articles of salvage recovered from a wreck site located *outside* the jurisdiction of the State of Florida and on lands not owned or possessed by the State of Florida. Section 267.061 (1)(b), Florida Statutes, which purports to vest title in the State *does not apply* since the property was not on "sovereignty lands of the State."

(App.Pet.Cert.117).

Florida's claim to an ownership interest because of a purported salvage contract between Treasure Salvors and the

State of Florida was rejected by the trial court on *five* different grounds. The salvage contract was invalid, *first,* because it had been obtained through coercion by threats of arrest and confiscation of salvage equipment. (App.Pet.Cert. 123). *Second,* that it was *ultra vires* because Chapter 267 only authorized the State to enter into salvage contracts on state-owned sovereignty submerged lands (the statute was acknowledged in the contract itself as the sole authority for entering into the agreement). (App.Pet.Cert. 126). *Third,* there had been a mutual mistake of fact in reference to the location of the wreck site on state sovereignty submerged lands. (App.Pet.Cert. 45-47, 124). *Fourth,* there was a total want or failure of consideration as the wreck site was not on state-owned sovereignty submerged lands. (App.Pet.Cert. 48, 124-128). *Fifth,* the State by reason of misconduct and breach of fiduciary duty, forfeited any rights it might have had under the salvage contract. (App.Pet.Cert. 130-132).

On appeal, the State's contention as to ownership of articles of salvage was restricted to the argument that the wreck was on state-owned sovereignty submerged lands as provided by Chapter 267 at the time of the execution of the salvage contracts, because *United States v. Florida,* 420 U.S. 531 (1975) did not apply or, if applicable, could not be applied retroactively. (State Appellate Brief No. 78-2950, 5th Cir. pp. 12-16, 46-47). This position was rejected by the appellate court. (App.Pet.Cert. 17-18, 49).

In its Fifth Circuit Brief, Florida did *not* contest that the contract was invalid because of coercion and because of misconduct. Neither did the State question that reccission was a proper remedy for the mistake of fact, want of consideration and *ultra vires* defects, *if* the wreck site was determined to be *not* on state-owned submerged lands at the time the contracts were executed. Florida also did not contest that the wreck site was *now* located outside the boundaries of the State of Florida, as defined by this Court in *United States v. Florida.* (State Appellate Brief No. 78-2950, 5th Cir.).

The trial court also held that the State performed no salvage service of value (App.Pet.Cert. 69), which finding was not contested on appeal. In addition, the trial court doubted that the State of Florida could have ever located the *Atocha*, much less have salvaged it. (App.Pet.Cert. 69).

As an express *alternative* holding, the trial court stated Chapter 267 was unconstitutional for several reasons. (App.Pet.Cert. 136-141). This issue was not considered in the court of appeals' decision to which this Court granted certiorari on the sole issue of the Eleventh Amendment.

The interest in archaeology and in preserving the heritage of the State of Florida, expressed throughout the State's brief in this Court and in the Amici Brief were *not* discussed in the appellate opinion below on the issue of whether the arrest of salvage articles recovered from a wrecked vessel outside of Florida's boundaries was barred by the Eleventh Amendment, or in relation to other issues decided by the Court. (App.Pet.Cert. .7-60). The record contains no evidence of any duly promulgated state policy, authorized by Florida laws, regarding the salvage of wrecks of archaeological interest on navigable waters *outside* of state-owned sovereignty submerged lands. Both the trial court and the appellate court recognized that Chapter 267 (§267.061 (1)(b)) by its express term applied only to "state-owned lands or state-owned sovereignty submerged lands." (App.Pet.Cert. 49-50).

The trial court had noted, however, that state employees' interest in extraterritorial wrecks was not sufficient basis to *take* the property.

> The ship *Atocha's* association with Florida is tangential at best and certainly is not integral to the heritage and development of the State. The ship was bound on a voyage from Havana to Cadiz when the storm of 1622 drove it close to, but outside of, the boundaries of the later State of Florida. Its cargo was not connected or associated with the Florida peninsula . . . . Merely because agents of the State covet the treasure, does not give the agents the right to take it in the name of the State.

(App.Pet.Cert.68-69).

Treasure Salvors offered uncontroverted evidence at the evidentiary hearing on the supersedeas bond in reference to their substantial archaeological, historical and public benefit contributions. (R.v.V 10-12, 19-20, 46-48). In contrast, the Division of Archives was found to have deliberately destroyed valuable provenience date, by removing tags which provided the only link between specific artifacts and their spatial relationship on the bottom. (R.v.V 24-25, 40). Thus valuable archaeological information was lost forever, notwithstanding the substantial reconstruction of the information by Treasure Salvors' archaeologists. (R.v. V 43-44).

At this evidentiary hearing, the trial court found that the Director of the Division had filed a false affidavit, (R.v.V 54-55). Also that the Division had not performed its duties under Chapter 267 and had been grossly negligent in its custodial care of the articles of salvage:

> The Court is shocked, very frankly, with the testimony that some 572 items have been lost in a cleaning process, once the articles were in the custody of the State and is especially shocked at the fact that an emerald, among other things, has been lost while in State custody.
>
> The Court finds it extremely difficult to believe that the State has been such a good custodian as it claims to be.

R.v.V 56.

The State of Florida, by its own admission, only exhibited 6 to 9 articles of salvage out of the thousands recovered during the time the entire treasure was in the possession of the State of Florida. (R.v.IV 100). Even subsequently, when an exhibit was being planned for Explorers' Hall at the National Geographic Society headquarters in Washington, D.C. to be opened by the Queen of Spain, the Division of Archives would not loan the mariners astrolabe which had been recovered from the *Atocha* until after the Florida Secretary of State (who has overall control of the Division) was promised

that he would be presented to the Queen. (R.v.V 21-22).

Following the affirmance on appeal, denial of rehearing and the issuance of the appellate mandate, the State of Florida filed a timely Petition for Writ of Certiorari on the *single* question of whether the proceeding was barred by the Eleventh Amendment. This Court granted Certiorari as to such question.

SUMMARY OF ARGUMENT

The maritime arrest of articles of salvage at bar does not constitute a suit against the State of Florida within the meaning of the Eleventh Amendment. Upon the State's assertion of immunity, the federal court should make appropriate jurisdictional findings rather than blindly accepting the assertion by the State as conclusive.

The dissent below complained, and the Petitioner State now complains, that the result is "equivalent to asserting that suits against a state are permitted if the result is that the state loses." (App.Pet.Cert. 55) With due deference, where the suit is to seize property that is not owned by the state and in the custody of state agents who are not lawfully entitled to possession, it is no more a suit against the state than that involved in *Ex parte Young*, 209 U.S. 123 (1908) and its progeny.

The Fifth Circuit affirmed the trial court holding that the federal court had the inherent power to determine the question of its jurisdiction. Not only in admiralty, but in other areas where state agents have had custody of property and seek to include or avoid any determination of ownership by the rightful claimant, this Court has refused to allow the Eleventh Amendment or sovereign immunity to automatically bar relief. *See, e.g., In re New York (The Queen City)*, 256 U.S. 503 (1921) and *United States v. Lee*, 106 U.S. 196 (1882). The principle that the judicial system will determine the appropriate jurisdictional facts governing the application of the Eleventh Amendment is a common thread through this Court's immunity decisions.

The State contended below that the arrest of the articles of salvage in the custody of state agents was a suit against the State because the State was the purported owner. Treasure Salvors had recovered the disputed articles of salvage from a wreck it found on the continental shelf that previously had been judicially determined to be outside the three-mile territorial boundary of the United States, as well as in an area outside the boundary of state submerged lands as determined by this Court.

The State's ownership claim was based on Chapter 267, Florida laws, which expressly limits any basis of any claim of ownership and the power of the State Division of Archives to control and contract for salvage of wrecked vessels located on "state owned sovereignty submerged lands." The wreck lay outside such lands and the trial court further held the purported salvage contract to be of no effect on five separate grounds. The trial court as jurisdictional facts found that the State was never the owner of the *Atocha* or its cargo and that agents of the State without statutory or other authority, had wrongfully taken and withheld possession of the articles of salvage from Treasure Salvors.

Rather than disputing the correctness of the trial court's jurisdictional findings, Petitioner Florida claimed that the mere assertion of the Eleventh Amendment not only bars the action, but ousts the federal court of jurisdiction as well. The history and purpose of the Amendment does not support this interpretation and it would violate Constitutional due process. If countenanced, it would permit a State under the protection of the Federal Constitution to falsely claim itself to be the owner and wrongfully take property.

The State's argument claiming title to wrecked and abandoned vessels on the outer continental shelf outside the three-mile territorial boundary of the United States on the basis that the State of Florida has different boundaries for different purposes is without merit since 1) Florida's statute expressly limits its application to "state-owned sovereignty submerged lands" and no other Florida law purports to claim

the ownership or the right to control salvage of wrecks not located on state-owned submerged land; 2) prior to the 1953 Federal Submerged Lands Act, the State of Florida had no ownership interest whatsoever in any submerged lands seaward of its coast; and 3) the wreck of the *Atocha* was located and salvaged outside the three-mile limit of the boundary of the limited interest in the natural resources of submerged lands that the federal government conveyed to the State.

The State further waived the Eleventh Amendment by statute (F.S. §69.041 (1) (b)) and by participation in an area of federal preeminence. *Parden v. Terminal Railway*, 377 U.S. 184 (1964). The State, being in privity with the United States and failing to intervene is bound by the determination in *Treasure Salvors I*, 569 F. 2d 330 (1978). Finally, the laudable but dubious interest of the State in archaeology is not determinative of the Eleventh Amendment issues to which this Court granted Certiorari.

ARGUMENT

I. THE ELEVENTH AMENDMENT DOES NOT BAR ARREST OF ARTICLES OF SALVAGE FROM ATOCHA MERELY BECAUSE THE STATE ASSERTS A DISPUTED CLAIM OF OWNERSHIP.

A. The Eleventh Amendment Issues Raised by the Proceeding at Bar Do Not Affect the Fisc of the State.

In Eleventh Amendment cases, this Court traditionally has looked closely to see if the relief sought would impact upon the fiscal integrity of the state. This case arose out of an admiralty case seeking to arrest articles of salvage recovered by Treasure Salvors. The State had taken the salvaged articles from Treasure Salvors and State employees had custody of

the articles at the time of the arrest. As the trial court noted, the ancillary process issued in reference to the initial complaint in admiralty and not pursuant to the supplemental complaint for declaratory relief which, although filed, the trial court never acted upon. (App.Pet.Cert. 146-47, 104-10). Whether the suit is an admiralty *in rem, in personam,* or a common law action in mere form, of course, is not determinative of the Eleventh Amendment issue. The *significance* of this action, being the seizure of certain salvaged articles by the Federal Marshal, is that no monetary judgment has been sought nor could be entered against the State.

The Eleventh Amendment issue at bar can be stated with precision:

> Where property in custody of State employees is ordered seized in a maritime *in rem* proceeding by process from the federal district court, does the court, upon the assertion of the Eleventh Amendment by the State, have the power to determine as a jurisdictional fact whether the state is the owner and entitled to possession, and, if not, hold the Eleventh Amendment is no bar?

On the basic question whether mere custody by the State of the articles of salvage precludes, under the Eleventh Amendment, the exercise of jurisdiction by the federal district court, the trial court as a *jurisdictional fact* found that the State was not the owner of the property in question, and the agents and employees of the State had wrongfully taken and withheld possession from Treasure Salvors. (App.Pet.Cert.151,154). Under these circumstances the seizure of the salvaged property (which because of the State's failure to post the supersedeas bond, is not in the actual possession and control of Treasure Salvors, Inc.) is not comparable to proceedings seeking recovery of a monetary judgment for retroactive relief which would have to be obtained from revenue generated by the State as in *Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Assn.,* 101 S. Ct. 1032 (1981).

The "shield" of the Eleventh Amendment has also been characterized as a "sword" which the states attempt to use to "forestall suits by individual creditors" or those having rights that operate against the State. *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 276 n. 1 (1959). This "sword" or "shield" can give way when equitable or injunctive relief is sought, *Ex parte Young*, 209 U.S. 123 (1908), or when the monetary relief is prospective, *Milliken v. Bradley*, 433 U.S. 267 (1977), or the costs have an ancillary effect on the state treasury, *Edelman v. Jordan*, 415 U.S. 651, 668 (1974). Although the Court cannot control the discretion of a state officer, it can direct the officer to perform some ministerial duty or to refrain from doing an act which he has no legal right to do . *Ex parte Young, 209 U.S. at 158-59.*

Some cases have permitted an award of monetary relief where deprivation of an individual's Fourteenth Amendment rights occurred. *See, e.g., Maher v. Gagne*, 488 U.S. 122, (1980); *Hutto v. Finney*, 437 U.S. 678 (1978); *Fitzpatrick v. Bitzer*, 427 U.S. 45 (1976). Other cases have spoken of monetary awards simply having an "ancillary effect" on the state treasury and not coming under the Eleventh Amendment protection. *See, e.g., Milliken v. Bradley, supra* (state must pay $6 million to defray costs of school desegration), *Edelman v. Jordan, supra.* The Court in *Edelman* stated:

> [F]iscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature. State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been free to pursue their previous course of conduct. *Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in Ex parte Young, supra.*

415 U.S. at 667-68.

The seizure of articles of salvage in the custody of the State by the United States Marshal and the subsequent determination of ownership by the district court does not affect the fisc of the State.

B. The Eleventh Amendment Does Not Apply To In Rem Actions Where the State is Not the Owner of the Res.

The State contends that the federal court has no power to consider the validity of an Eleventh Amendment objection once the State merely claims to the owner. Brief for Petitioner, p. 18-19. No case by this Court or a court of appeals so holds. The trial court declared that the Eleventh Amendment "is not both a self-proclaimed and self-determined ukase of the State," (App.Pet.Cert. 151). The Fifth Circuit based its affirmance on the view that the federal court had the inherent power to determine the question of its jurisdiction. (App.Pet.Cert. 28-29). Decisions by this Court, addressing not only admiralty and maritime matters, but also other areas where the state has had custody of the property and sought to preclude or avoid any determination of ownership by the rightful claimant reflect the same view. *See, e.g. In re New York (The Queen City),* 256 U.S. 503 (1921) and *United States v. Lee,* 106 U.S. 196 (1882).

Both the district court and the Fifth Circuit expressly recognized the potential application of the Eleventh Amendment to admiralty in rem proceedings *when the state owns the vessel in question and arrest would interfere with a governmental function,* as held by this Court in *In re New York (The Queen City),* 256 U.S. 503 (1921). This Court in *The Queen City* and its companion case *Ex parte New York,* (No. 1) 256 U.S. 490 (1921) had held that the maritime proceedings in question were barred. In *The Queen City* the state attorney general sought prohibition and mandamus on the basis that the vessel in question was immune from arrest as:

> she was the *absolute property* of the State of New York, in its possession and control, and *employed in the public service of the State for governmental uses and purposes,* and, at the times mentioned in the libel, was authorized by law to be employed only for the public and governmental uses and purposes of the State of New York . . . .

256 U.S. at 508 [emphasis added]. In *The Queen City* no special challenge had been made of the state claims of ownership and public use. Indeed the trial court had accepted such allegation as being true, but then held erroneously that the vessel was not immune:

> To the suggestion that the *Queen City* is the property of the State of New York, in its possession and control and employed in its public governmental service, it is objected at the outset that the record and proceedings in the suit in admiralty do not disclose the identity of the owner of the vessel or that she was employed in the governmental service of the State. We deem it clear, however, that the verified suggestion presented by the Attorney General of that State, in his official capacity as representative of the State and the People thereof, amounts to an official certificate concerning a public matter presumably within his official knowledge, and that it ought to be accepted as sufficient evidence of the fact, at least *in the absence of special challenge.* The suggestion was overruled and denied, with costs, and process thereupon ordered to issue against the vessel, without any intimation that there was doubt about the facts stated in the suggestion, or opportunity given to verify them further. It would be an unwarranted aspersion upon the honor of a great State to treat facts thus solemnly certified by its chief law officer, *and accepted as true when passed upon by the District Court,* as now requiring verification.

256 U.S. at 509 (emphasis added).

Here, the State's ownership *was* contested and the trial court allowed the State an evidentiary hearing after challenge and made jurisdictional fact findings that the State never owned the *Atocha*, its cargo, etc. These findings were affirmed by the Fifth Circuit. (App.Pet.Cert. 29-30). There has been no contention in the courts below that the vessel was in the public service of the State, of course, as it had sunk in 1622, long before we became a nation and long before Florida became a state. The disputed ancillary warrant of arrest issued by the trial court after the court of appeals in *Treasure Salvors I* rejected the *federal* claim of ownership and determined that the wrecked vessel lay on the continental shelf outside the territorial waters of the United States. Because Florida's unsupported claim of ownership was duly challenged, the question of ownership was properly regarded by the Fifth Circuit below as a jurisdictional matter to be judicially resolved upon the evidence. (App.Pet.Cert. 28-29). The resolution of this jurisdictional fact determined the application of the Eleventh Amendment.

The Fifth Circuit interpreted *The Queen City* in the opinion below thusly:

> The *Queen City* tells us that when a state submits uncontroverted evidence of ownership in an admiralty in rem action, the district court is bound to accept the assertion and apply the eleventh amendment accordingly. In the case at bar, however we have a *controverted* claim of ownership. Treasure Salvors offered evidence and legal arguments to show that it, and not Florida, owned the artifacts from the *Atocha*. Such an offer is the "special challenge" that the Supreme Court envisioned in the *Queen City*. This challenge operates to rebut the presumption of validity attributed to a state's ownership claim.
>
> Once an appropriate challenge is made, a district judge is no longer compelled to conclude that the state owns the

> res in dispute. Instead, the Court must make a jurisdictional determination . . . .

(App.Pet.Cert.27-28).

The Fifth Circuit stated in its footnote to the quoted text:

> This approach is especially desirable in admiralty in rem actions. Federals courts have exclusive jurisdiction over admiralty in rem proceedings. *Madruga v. Superior Court of California,* 346 U.S. 556, 74 S.Ct. 298, 98 L.Ed. 290 (1954), G. Gilmore and C. Black, The Law of Admiralty 1-13 (2d ed.1975). If the mere assertion of ownership by a state of a res was sufficient to invoke the eleventh amendment, petitioners such as Treasure Salvors would find themselves stranded without a forum in which to litigate their claim. (App.Pet.Cert. 29, n.19).

This Court has recognized in analogous maritime cases that a claim of sovereign immunity asserted by a foreign government against arrest of a vessel, if challenged, will allow the district court to make appropriate jurisdictional findings as to the ownership of the vessel. In *The Navemar,* 303 U.S. 68 (1938), this Court considered whether a claim of immunity from arrest of a vessel by the Republic of Spain was a proper issue for the court to resolve. The Court of Appeals for the Second Circuit accepted Spain's suggestion of sovereign immunity as conclusive, but this Court reversed saying:

> This, we think was a mistaken view of the force and effect of the suggestion. Admittedly a public vessel . . . is immune from suit in the courts of admiralty of the United States . . . But [the district court] *was not bound,* as the Court of Appeals thought, *to accept* the allegations of *the suggestion as conclusive* . . . .
>
> But *the filed suggestion,* though sufficient as a statement of the contentions made, *was not proof of its allegations.* This Court has explicitly declined to give such a suggestion the force of proof . . . .

303 U.S. 68, 74-75 (citing *In re Muir* 254 U.S. 522 (1920). In *In re Muir* the Court said:

> [I]t is apparent that the status of the Gleneden [the ship alleged to be in British service] . . is at best doubtful and uncertain, both as a matter of fact and in point of law. The jurisdiction of that court is correspondingly in doubt, *for it turns on the status of the vessel* . . . . The Court may take up again the question of its jurisdiction.

254 U.S. 522, 533 (1920) (emphasis added).

The sole situation in which an assertion of ownership by a foreign sovereign is considered conclusive is where the Executive Department of the United States government *officially* recognizes the foreign state's claim to sovereign immunity as the owner in possession and service. *The Navemar,* 303 U.S. at 74. This exception is inapplicable as we have no diplomatic matter involving the conduct of foreign affairs; moreover, the United States itself in the earlier case, *Treasure Salvors I,* 569 F.2d 330 (5th Cir. 1978) unsuccessfully claimed to be the owner of the articles of salvage from the *Atocha.* The claim of the United States was a repudiation of and in direct conflict with the claim of the State.

In *Republic of Mexico v. Hoffman, (The Baja California),* 324 U.S. 30 (1945), the Republic of Mexico filed a suggestion of ownership to a privately operated ship claiming sovereign immunity from an in rem action in admiralty. The district court denied the claim of immunity and proceeded with a trial on the merits, finding the ship in the possession and control of a private company which had contracted with the Mexican government to operate the ship. On certiorari, this Court upheld the trial court's action, ruling that "the courts may decide for themselves whether all the requisites of immunity exist." *Id.* at 34-35.

While differences may exist between the Eleventh Amendment and the sovereign immunity of a foreign state, the principle calling for judicial determination of the

jurisdictional fact of state or sovereign ownership and service would be the same. Further, we have an express ruling by this Court rejecting the State's claim of title to the submerged lands in the area wherein the wreck was determined to be located by the trial court. *United States v. Florida,* 420 U.S. 531 (1975).

In an *in rem* proceeding against a vessel or articles of salvage, the court issues a warrant of arrest *in rem* and the *res* is then placed under control or otherwise constructively secured by the United States Marshal. We submit, the rule to be: *if the vessel or property is owned* and in the service of the state or sovereign, the litigation to enforce the maritime lien, for salvage service or otherwise, will be considered a suit against the state or sovereign; *if not owned by the state,* the litigation of finder's title or maritime lien does not constitute a suit against the state. Thus, the ownership of the *res* becomes a jurisdictional fact. In this case against articles of salvage, no judgment has been sought against the State of Florida; the suit will not raid the State's treasury.

In 1882, the validity of an asserted claim by the United States and its ability to divest the court of jurisdiction was at issue. The United States claimed ownership of property and insisted that the mere *claim* by the sovereign forbade any inquiry into the claim. The Court responded in an eloquent opinion in *United States v. Lee,* 106 U.S. 196 (1882):

> Under our system the people . . . are the sovereign. Their rights . . . are not bound to give way to a sentiment of loyalty to the person of the monarch. The citizen here knows no person . . . to whom he need yield the rights which the law secures to him . . . *when he, in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States should prevent him from using the means which the law gives him for the protection and enforcement of that right.*

Id. ad 208-09 (emphasis added).

> The position assumed here, [by the government] is that, however clear his rights, no remedy can be afforded to him when . . . his opponent is an officer of the United States [or officer of the State of Florida?], claiming to act under its authority . . . The objection . . . forbids any inquiry into the truth of the assumption that the parties setting up such authority are lawfully possessed of it . . .
>
> But why should not the truth of the suggestion and the lawfulness of the authority be made the subject of judicial investigation? *Id* at 219.
>
> * * *
>
> The evils supposed to grow out of the possible interference of judicial action with the exercise of powers of the government . . . will be seen to be small indeed compared to [the evil of the government using an absolute veto to deprive a person of property after a judgment by a court that the individual has a right to possession of the property.]. *Id.* at 221.

Nearly 100 years later Justice Stevens, concurring in *Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Assn.*, 101 S. Ct. 1032,1036 (1981) stated:

> Citizens must have confidence that the rules on which they rely in ordering their affairs—particularly when they are prepared to take issue with those in power in doing so—are rules of law and not merely the opinions of a small group of men who temporarily occupy high [state?] office. It is the unpopular or beleaguered individual—not the man in power—who has the greatest stake in the integrity of the law.

The State can not use the "shield" of the Eleventh Amendment as a "sword" to violate due process. To deprive the court of the power to decide the jurisdictional facts of state

immunity under the Eleventh Amendment or the doctrine of sovereign immunity would be in violation of due process. Not only did the trial court hold the purported salvage contracts to be invalid on five different grounds, including coercion, but the trial court also found that the agents of the State of Florida had wrongfully taken possession of the articles of salvage in violation of due process under Florida and Federal law. (App.Pet.Cert. 123-22, 150, 154). This Court in *United States v. Lee,* and the Florida Supreme Court recognize this as a ground for removing the cloak of immunity from the wrongdoer.

In *State Road Department of Florida v. Tharp,* 1 So. 2d 868, 869-70 (Fla. 1941), the Florida Supreme Court rejected the State's claim of immunity, announcing that:

> To deprive the citizen of his property by other than legal processes and depend on escape from the consequences under cover of the plea of nonsuability of the State is too anomalous and out of step with the spirit and letter of law to claim protection under the Constitution . . . If a State agency can deliberatlely trespass on and destroy the property of the citizen in the manner shown to have been done here and then be relieved from making restitution on the plea of nonliability of the State for suit, then the Constitutional guaranty of the right to own and dispose of property becomes nothing more than the tinkling of empty words. Such a holding . . . would reverse the order of democracy in this country and lead it into a blind alley.

The courts below recognized their judicial duty to resolve the disputed jurisdictional fact of ownership in considering the State's plea of the Eleventh Amendment. For this reason the judgment should be affirmed.

II. FLORIDA HAS WAIVED ELEVENTH AMENDMENT PROTECTION BY STATUTE AND BY VOLUNTARY

PARTICIPATION IN AN AREA OF FEDERAL PREEMINENCE.

A. The State of Florida Has Waived Its Eleventh Amendment Protection by Express Statutory Consent to Suit in Federal Court.

The Florida Constitution, art.10 §13, allows for "general law for bringing suit against the state as to all liabilities . . . hereafter originating." The statute regarding liens and claims in personal property authorizes suit in either state or federal court:

> The state may be [sued] in . . . any district court of the United States, having jurisdiction of the subject matter . . . for the foreclosure of a . . . lien on . . . personal property on which the state . . . claims a . . . lien.

Section 69.041 (1) (b), Florida Statutes (1979).

The State's claim to the salvage from the *Atocha* was predicated on a statute asserting ownership to all sunken ships lying on "sovereignty submerged lands." Because Florida claims ownership to salvage recovered outside its boundaries, any interest claimed by the State under the alleged salvage contracts is a salvage lien under §69.041 (1)(b) Florida Statutes. (App.Pet.Cert. 155-56).

Admiralty gives a salvor a "lien" on the salvage. The lien is *not* a debt owed, but a *property interest* in the salvage. Further, salvors taking possession of abandoned derelicts have not only a lien, but absolute possession and control which vests by operation of law, *Wiggins v. 1100 Tons, More or Less, of Italian Marble,* 186 F.Supp. 452, 456 (E.D.Va. 1960), and *no one can interfere with them* except in cases of manifest incompetence. *Rickard v. Pringle,* 293 F. Supp. 981, 985 (E.D.N.Y. 1968); *Broere v. Two Thousand One Hundred Thirty-Three Dollars,* 72 F. Supp. 115 (E.D.N.Y.) 1947).

Under §69.041 (1) (b), Florida Statutes, the State has waived immunity from suit in federal court to resolve

conflicting salvage liens involving claims or ownership or interest in the salvaged property. Neither the statute nor the case law construing it restricts the nature of the statutorily required lien.

The State cites *Seaside Properties, Inc. v. State Road Department,* 121 So. 2d 204 (Fla. Dist. Ct. App. 1960) as holding that §69.041, Fla. Sta., is a "lien statute only." Brief for Petitioner, p.43, but neglects to mention that *Seaside Properties* construes the waiver as available when the state *commits acts amounting to a taking of property without compensation therefor. Seaside Properties,* 121 So.2d at 205. This principle and that of the Florida Supreme Court's decision in *State Road Department of Florida v. Tharp,* 1 So.2d 868 (Fla.1941), would be applicable whether the property that is wrongfully taken is real or personal and even if conflicting maritime liens were not involved. The trial court below determined that "the agents for the [State] wrongfully, and in violation of basic due process rights under federal and Florida law, deprived Treasure Salvors of its property." (App.Pet.Cert. 154).

Although this Court requires a clear waiver of the Eleventh Amendment, *Edelman v. Jordan,* 415 U.S. 671 (1974); *Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Assn.,* 101 S. Ct. 1032 (1981), whether the State has waived the Amendment is in itself a federal question of which this Court is the ultimate arbitrator. *Petty v. Tennessee-Missouri Bridge Commission,* 359 U.S. 275 (1959). Under the circumstances present in this case, Florida Statute §69.041 (1) (b) constitutes a waiver of the Eleventh Amendment.

B. The State of Florida Waived its Eleventh Amendment Protection by Participation in an Area of Traditional and Paramount Federal Regulation.

The Constitution of the United States outlines the supremacy of the federal government in specified areas, and the authority of Congress to act pursuant to the Constitution

without interference by the states has been stated in numerous decisions. *See,e.g. Maryland v. Louisiana,* 101 S. Ct. 2114 (1981); *Maher v. Gagne,* 488 U.S. 122 (1980); *Parden v. Terminal Railway,* 377 U.S. 184 (1964). Once a state "leaves the sphere that is exclusively its own and enters into the activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation." *Pardon,* 377 U.S. at 196.

Resolving jurisdictional challenges based on Eleventh Amendment immunity, a court must scrutinize the underlying activity to determine if it falls within the field of state activities within Eleventh Amendment protection. A state engaging in traditional state police power activity may legitimately assert the Eleventh Amendment to protect itself from improper claims *e.g., Edelman v. Jordan,* 415 U.S. 651 (1974), but a state participating in areas of traditional and paramount federal rgulation cannot assert the Eleventh Amendment as a shield to insulate its noncompliance with the federal law. *Parden v. Terminal Railway,* 377 U.S. 184 (1964). The federal courts having jurisdiction over the subject matter of admiralty cases have no right to decline to exercise that jurisdiction. *See, Ex parte Young,* 209 U.S. 123, 143, 160 (1980); *see also, Standard Oil Co. v. United States,* 25 F.2d 480, 483 (S.D.Ala.1928).

Though the Eleventh Amendment applies to bar a suit, the Court limits the effect to insulate a state's fiscal integrity. The *Edelman* Court determined that while the state was immune from suit to obtain *retroactive* welfare benefits, no such immunity existed in suits to enforce existing prospective rights to benefits. *Edelman,* 415 U.S. at 673-74. Though the welfare and care of its citizens is a traditional state concern, the state's voluntary choice to participate in a federal program incorporated into that decision the waiver of sovereign immunity with reference to the rights of its citizens in the particular program joined.

In *Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Assn.,* 101 S. Ct. 1032

(1981), a divided Court upheld the narrow *Edelman* construction of the Eleventh Amendment as banning suits to collect retroactive welfare benefits pursuant to federally sponsored programs. That analysis follows logically from the *Pardon* rule that a state, voluntarily engaging in an activity of traditional paramount federal control (operation of a railroad in interstate commerce), voluntarily subjects itself to the jurisdiction of the federal courts. *Parden*, 377 U.S. at 193-94.

In *Parden*, a personal injury suit was brought under the F.E.L.A., 45 U.S.C. §51-60, against the Alabama Docks Terminal Railway, a state agency. The state contended that the Eleventh Amendment barred suit. The Court held that the states, by constitutionally empowering Congress to regulate commerce, relinquished any sovereign rights they had in that area and had no immunity. *Parden*, 377 U.S. at 192.

> Congress is not attempting to extend its regulatory power to objects that would not otherwise be subject to it, but rather *to prevent objects otherwise subject to the power from being unjustifiably excepted.*

Parden, 377 at 194, n. 11 (emphasis added); *Employees v. Missouri Department of Public Health & Welfare*, 411 U.S. 279, 288-289 (1973) (Marshall, J. concurring).

Chesapeake Bay Bridge & Tunnel District v. Lauritzen, 404 F.2d 1001 (4th Cir. 1968), concerned the rights of the states when Congress regulates under its Commerce Clause power. The State of Virginia received a permit from the United States to construct a bridge-tunnel across the Chesapeake Bay. A light tower collapsed into the Bay and a vessel was damaged by the obstruction. The Fourth Circuit held the state had relinquished its sovereign immunity by obtaining the federal permit to build the bridge across a navigable waterway. This was an "exclusive Federal realm — interstate and foreign commerce," and the state was subservient to the paramount federal control. *Id.* at 1003.

Where the federal government has constitutionally pre-empted state action, or where a state law conflicts with the uniformity of the federal law, then the state may not act and

consequently claim sovereign immunity. *See, Askew v. American Waterways Operations,* 411 U.S. 325, 337 (1973); *Clyde Mallory Lines v. Alabama,* 296 U.S. 261, 267 (1935).

The admiralty and maritime proceeding was within the exclusive subject matter jurisdiction of the federal district court pursuant to 28 U.S.C. §1333, as authorized by article III, §2 of the Constitution. Specifically, Congress in addition to general maritime law regarding salvage, provided in the Salvage Act of 1912 the following reference to wrecks off the State of Florida:

> All property, of any description whatsover, which shall be taken from any wreck, from the sea, or from any of the keys and shoals, within the jurisdiction of the United States, on the coast of Florida, shall be brought to some port of entry within the jurisdiction of the United States.

42 U.S. C. §722.

The Salvage Act was a legislative implementation by the United States of the *Convention on Certain Rules Relating to Assistance and Salvage at Sea.* Signed 1910, entered in force by the U.S. 1913. 37 Stat. 1658; T.S. 576. This treaty also became the law of the land and provides that in salvage disputes between two nationals,the law of the "nation" will be applied.

The Supremacy Clause of the Constitution also preempts state action within a given area. In *Maryland v. Louisiana,* 101 S. Ct. 2114 (1981), this Court held a Louisiana tax on the "first-use of any natural gas brought into Louisiana," unconstitutional under the Supremacy Clause, art. VI, cl. 2, and the commerce clause, art. I, §8, cl. 3. *Id.* at 2132, n. 26.

If the state attempts statutory regulation in an area of federal supremacy, any conflict voids the state statute if compliance with both statutes is impossible or the state statute is an "obstacle" to effectuation of the Congressional objective. *Id.*

Florida's intrusion into the federal realm of admiralty, by claiming authority over salvage operations inside and outside its terrritorial waters under Chapter 267, Florida Statutes, is an "obstacle" to the federal objectives of consistency and uniformity in salvage regulation under the general maritime law, the Salvage Act and the Salvage Treaty. The trial court held that "Chapter 267 . . . cannot be used to alter or prejudice the rights of a finder or salvager under applicable maritime." (App.Pet.Cert.135). This Court has observed that there is a need for symmetry and harmony in admiralty and that the uniform operation of admiralty principles is basic to the government's control over maritime activities. *Ex parte New York,* 256 U.S. 490, 502-3 (1921); *Southern Pacific Co. v. Jensen,* 244 U.S. 205 (1917).

The State suggests that it can disrupt and *foreclose* the federal govenment's control over maritime activities. The ability to claim ownership of salvage brought up by a Florida corporation inside or outside Florida territorial waters, and to concurrently preclude admiralty court adjudication of rights of salvage and possession, conflicts with the uniform national regulation of maritime activities intended by article III, §2, of the United States Constitution, *Southern Pacific Co. v. Jensen, supra.*

The State admits its entry into this admiralty suit was in part prompted by its interest in protecting its status as *"a center of maritime commercial activity," Brief for Petitioner, p. 31, then asserts that, since the suit will affect claimed property rights of the State in maritime salvage, only* a state court may litigate the State's claim.

In addition to waiver based upon participation in federal governmental programs where the relief was prospective, this Court has held that asserting a claim in federal court will constitute a waiver. In the evidentiary hearing before the district court, the State of Florida objected to the court's jurisdiction, plead the Eleventh Amendment and asserted an affirmative claim on the merits to the *res* subject to the ancillary arrest warrant. The trial court noted the State's

affirmative claim would be a waiver under the Eleventh Amendment as to the merits of the State's claim. The district court relied upon the Supreme Court's decision in *Gardner v. New Jersey*, 329 U.S. 565, 573-74 (1947) stating:

> It is traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure. If the claimant is a State, the procedure of proof and allowance is not transmitted into a suit against the State because the court entertains objections to the claim. The State is seeking something from the debtor. No judgment is sought against the State. The whole process of proof, allowance, and distribution is, shortly speaking, an adjudiciation of interests claimed in a *res*. It is nonetheless such because the claim is rejected into to, reduced in part, given a priority inferior to that claimed or satisfied in some way other than payment in cash. When the State becomes the actor and files a claim against the fund it waives any immunity which it otherwise might have had respecting the adjudication of the claim . . . . . (App.Pet.Cert.144).

Waiver in suits in admiralty is a federal, not state, question. "Where a State's consent to suit is alleged to arise from an act not wholly within its own sphere of authority, but within a sphere . . . subject to the power of the federal government, the question of whether the State's act constitutes the alleged consent is one of federal law." *Parden*, 377 U.S. at 196. This Court must never allow a state to construct a legal framework where the state voluntarily enters a federally regulated activity, but concurrently forecloses suit against itself by asserting the Eleventh Amendment sovereign immunity. *Id.*

Here, the State has entered the traditional maritime activity of salvage, a subject of *exclusive* federal jurisdiction. In so doing, the State, as did Alabama in *Parden*, voluntarily submitted itself to the jurisdiction of the federal court.

The State act in reality abolishes the traditional martime remedy of a "pure salvage" award and attempts to substitute therefor a state regulated system of contract salvage. There is no significant distinction between a pure salvage award and a contractual salvage award insofar as jurisdiction is concerned. Federal admiralty courts review both. Both contract salvage and pure salvage generage salvage liens. The salvage contact entered into by appellant and appellee "i.e. no cure, no pay" provides a matter over which the courts of admiralty have *always* asserted their salvage jurisdiction.

The facts show that the trial and appellate courts correctly held that there was a maritime lien, the salvage contract involved a maritime activity and lien claim cognizable only in admiralty, and the trial court had jurisdiction to determine the validity of the ownership claim by the State which formed the statutory basis of the contract.

The Amici plead in their brief that:

> The underlying dispute over the construction of the contract is purely and simply a local questin, quite separate from any admiralty considerations. Amici bried at 18.

The salvage of maritime objects in international waters on the outer continental shelf is *not* local. State legislation may not intrude into an exclusive maritime area nor change the uniform application of a statute or the general maritime law. *Southern Pacific Co. v. Jensen,* 244 U.S. 205 (1917).

In the case at bar, not only is there no other adequate forum to protect Treasurer Salvors' interest in the articles of salvage, but here is no state court remedy at all. Recently, the State of Florida's Third District Court of Appeal upheld the dismissal by a state trial court of a salvage action even though the action was brought *in personam* rather than *in rem.* The State appellate court, as a matter of state law, held that:

> Salvage being a matter particularly within the jurisdiction of the admiralty courts because, inter alia, of

> the particular system of awarding the compensation, we hold that the trial court correctly dismissed the instant salvage action.

O'Neill v. Schoenbrod, 355 So.2d 400 (Fla. Dist. Ct. App. 1978).The plaintiff then restyled his action and refiled it alleging "unjust enrichment." The trial court and the appellate court dismissed this second try at "disguising a salvage claim," ruling that state court litigation was preempted and would serve only to "create confusion and unnecessary state-federal jurisdiction conflict." *O'Neill v. Schoebrod,* 374 So. 2d 70-71 (Fla.Dist.Ct.App. 1979); *See also, Sturgis v. Law & St. John,* 5 Barb. 451 (N.Y. App.Div. 1850). This view is in accord with the historic treatment of salvage cases:

> Cases of salvage were not tried in American common-law courts before the establishment of the Republic of the United States of America. Therefore, the savings to suitors clause of the Act of September 24, 1789 . . . does not apply to salvage suits. It does not give the common-law courts jurisdiction over a class of cases which it never possessed.

M. Norris, *Law of Salvage,* Note 3, §14 at 18.

As between Treasure Salvors and the State of Florida, litigation regarding a maritime salvage contract which involves title to objects of salvage from a wreck outside the territorial limits of the United States, is a question of salvage. The answer to the State and the Amici's pleading is simple, what other court, but a court of admiratly, has jurisdiction to try a question of salvage? *Housman v. The Schooner North Carolina,* 40 U.S. (15 Pet.) 40, 48 (1841).

III. *THE COURTS BELOW CORRECTLY INTERPRETED UNITED STATES V. FLORIDA WHEN THEY FOUND THAT THE WRECK SITE OF THE ATOCHA IS NOT LOCATED ON SOVEREIGNTY SUBMERGED LANDS.*

For the first time, the State argues that the courts below "misinterpreted" this Court's decision in *United States v. Florida*, 420 U.S. 531 (1975), because that decision "established the State's boundaries for purposes of the Submerged Lands Act only." Brief for Petitioner, p. 75. The State did not raise this as a Question Presented in the Petition for Writ of Certiorari. Below, the State argued that *United States v. Florida* could not be applied retroactively:

> If *United States v. Florida* applies at all, that decision would have the effect of redefining the boundaries of Florida after the contracts were executed. This raises the question, when a federal court construes a federal statute will the court's decision be applied retroactively when to do so will effect contract or property rights?

(Florida's Fifth Circuit Brief pp. 46-47, No. 78-2950.) Florida has abandoned its retroactive argument. The federal Submerged Lands Act was passed in 1953, 14 years before Chapter 267, and 18 years before the salvage of the *Atocha* and the void salvage contracts.

The State admits that the Special Master's Report in *United States v. Florida* placed the *Atocha* outside the State's boundaries, as established for purposes of the Submerged Lands Act, but claims the State's historical and constitutional boundaries gave Florida the right to control the salvage operations of the *Atocha*. Brief for Petitioner, pp 77-92. This argument ignores three crucial facts: (1) Chapter 267, Florida Statutes (1979), by its express terms, requires that the location of the wreck site be on "state-owned sovereignty submerged lands"; (2) before the Submerged Lands Act was passed the State had *no* title to lands within the three-mile limit or on the continental shelf, *United States v. California*, 332 U.S. 19, 31 (1947); and (3) this Court decided in *United States v. Florida*, that the State is *not* the sovereign over the submerged land on which the *Atocha* is located. The district court and Fifth Circuit recognized these facts and properly rejected the State's title claim to the wreck site of the *Atocha*.

The State's title claim depends upon "sovereignty" ownership of the seabed where the *Atocha* lies as § 267.061 (1) (b) of the Florida Statutes *expressly* limited the Division of Archives' scope of authority to "state-owned sovereignty submerged lands." The contracts follow this limitation on state authority:

> The Division hereby grants unto the salvager a contract to conduct underwater salvage *from and upon certain submerged sovereignty lands of and belonging to the State of Florida.*

(J.A. 20-21). Irrespective of historical or constitutional boundaries which the State attempts to advance before this Court, the State, under its laws and contract, must be the sovereign over the submerged land in question before it has a title claim to the *Atocha* or *authority to contract for salvage* or before the contract applies to the salvage here in suit.

Accordingly, this case differs from the situation addressed in *Skiriotes v. Florida*, 313 U.S. 69 (1941). *Skiriotes* involved a state criminal prosecution for violation of the statute prohibiting the use of diving suits while fishing in water within the territorial limits of the State of Florida. 313 U.S. at 70. This Court's statement that the "State of Florida may . . . govern matters in which the State has a legitimate interest *and where there is no conflict with acts of Congress*" was *dicta* based upon the police power of a state and is not relevant to the language of the instant statute. 313 U.S. at 77 (emphasis added).

Here, Florida has no statute purporting to give the State a right to claim title to wrecks—found beyond "state-owned sovereignty submerged lands." Whether Florida could exercise control over its citizens for salvage operations on the high seas is not an issue under Chapter 267, Florida Statutes, or any other enacted law of Florida. See *Treasure Salvors, I*, 569 F.2d at 343, discussing rights of the United States in such respect.

The lower courts in rejecting Florida's claim to the salvage focused on this Court's decision in *United States v. Florida, supra*, defining the submerged lands over which Florida could assert a sovereign claim. The district court and the Fifth Circuit correctly recognized that the wreck site is not now, and never was, located on state-owned sovereignty submerged lands. The district court stated the *Atocha* was:

> located outside the jurisdiction of the State of Florida and on lands not owned or possessed by the State of Florida. Section 267.061(1)(b), Florida Statutes, which purports to vest title in the State does not apply since the property was not on "sovereignty lands of the State." The Division of Archives has no right nor interest in such property other than what might exist under an *ultra vires* contract between the Division and Treasure Salvors. Contrary to the Division of Archives' argument, the Supreme Court in *United States v. Florida*, 420 U.S. 531, 95 S.Ct. 1162, 43 L.Ed. 2d 375 (1975), did not modify nor change the State of Florida's seaward boundary but merely defined it as it was and is.

(App. Pet. Cert. 117-18). The Fifth Circuit likewise found "the Supreme Court, in United States v. Florida, 420 U.S. 531, 95 S.Ct. 1162, 43 L.Ed. 2d 375 (1975), held that the part of the continental shelf on which the *Atocha* was resting had *never* been owned by Florida." (App. Pet. Cert. 44-45).

The Special Master's Report this Court adopted in *United States v. Florida* supports the decision of the lower courts. The Special Master concluded that *United States v. California* 332 U.S. 19 (1947),[1] *United States v. Louisiana*, 339 U.S. 699

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[1]Here, this Court refused to extend the *Pollard* rule of ownership as an incident of state sovereignty in *relation to inland waters out into the soil beneath the ocean.* As this Court stated, "the belief that local interests are so predominant as constitutionally to require state dominion

(1950)[2], and *United States v. Texas*, 339 U.S. 707 (1950)[3] clearly established that "the State of Florida, prior to May 22, 1953, did not have title or ownership of the seabed . . . seaward from its coastline in either the Atlantic Ocean or the Gulf of Mexico." Further, the Special Master found the *only* seabed which Florida has acquired since its readmission to the Union in 1869 is the three-mile belt resulting from the 1953 Congressional grant under the Submerged Lands Act § 2(b), 67 Stat. 29, 43 U.S.C. §1301(b)[4] which "*in no event* extend[ed] from the coastline of the state more than three geographical miles into the Atlantic . . . " Special Master's Report, Conclusion 2.

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over lands under its land-locked navigable waters finds some argument for its support. But such can hardly be said in favor of state control over *any part of the ocean or the ocean's bottom.*" 332 U.S. at 34 (emphasis added).

[2]In this case, Louisiana claimed sovereign rights twenty-four miles seaward of the three-mile belt defined in *United States v. California.* This Court rejected Louisiana's claim and held, "if, as we held in California's case, the three-mile belt is in the domain of the nation rather than that of the separate states, it follows *a fortiori* that the ocean beyond that limit also is." 339 U.S. at 705.

[3]Where this Court prophetically stated, "Today the controversy is over oil. Tomorrow it may be over some other substance or mineral or perhaps the bed of the ocean itself. *If the property whatever it may be,* lies seaward of lower water mark, its use, disposition, management and control involve national interests and national responsibilities . . ." 339 U.S. at 719 (emphasis added).

[4]In defining the effect of the Submerged Lands Act, this Court noted in *United States v. Maine,* 420 U.S. 515 (1975), that "the grant to the states is *expressly limited to the seabed within three miles* (or three marine leagues in some cases) *of the coastline, whether or not the State's historic boundaries might extend farther into the ocean.*" 420 U.S. at 526 (emphasis added).

Likewise, in *United States v. Texas, supra*, the State sought to extend its sovereignty over the seabed off its Gulf coastline by legislatively defining its boundaries. In rejecting these legislative acts, this Court noted,

> Texas in 1941 sought to extend its boundary to a line in the Gulf of Mexico twenty-four marine miles beyond the three-mile limit *and asserted ownership of the bed within that area.* And in 1947 she put the extended boundary to the outer edge of the continental shelf. *The irrelevancy of these acts* to the issue before us has been adequately demonstrated in *United States v. Louisiana.*

339 U.S. at 720 (emphasis added)(footnotes omitted). Florida argues correctly, we believe, that articles of salvage are not natural resources. Brief for Petitioner, pp. 102-103. This gives the State no extra-territorial right to ownership of wrecked vessels on the continental shelf but suggests the State's title to natural resources under the Submerged Lands Act does not include ship wrecks and salvage. 15 San Diego L. Rev. 623 at 642-3. Jurisdiction of these matters within the territorial boundaries is controlled by the federal government since Congress reserved the navigational and maritime servitude. 43 U.S.C. §1314. In *Treasure Salvors I*, 569 F.2d 330, 338-40 (1978), the Fifth Circuit held that the United States did not have a claim of ownership to salvage recovered outside the three-mile boundary as defined in *United States v. Florida.*

The only proper sovereign claim which the State has off the Florida coast is to the natural resources of the submerged lands included in the 1953 limited congressional grant as defined by this Court in *United States v. Florida.* No other congressional grants of submerged lands exist and in the

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See also Note, 15 San Diego L. Rev. 623, 642, 643 (1978): "In *Treasure Salvors, Inc.*, the Court concluded that the [Submerged Lands Act] and the OCSLA granted jurisdiction over only minerals of the seabed and not sunken vessels." (emphasis added).

absence of such a grant, Florida cannot claim sovereign rights over submerged lands outside the three-mile belt expressly granted by Congress. Whether Florida can regulate its citizens outside this boundary is not the issue in this case and is irrelevant to the *factual* determination of where Congress—and this Court—have drawn the submerged lands boundary of Florida. The *Atocha* is not on state-owned sovereignty submerged lands, hence the State cannot claim title to the salvage on such basis. The lower courts correctly interpreted *United States v. Florida.*

IV. TREASURE SALVORS I, VESTING TITLE TO THE ATOCHA SALVAGE IN PLAINTIFFS, BINDS THE STATE SINCE IT WAS IN PRIVITY WITH THE UNITED STATES AND FAILED TO INTERVENE.

The trial court held the State bound by the determination of ownership of the *Atocha* and salvage therefrom made in the earlier claim by the United States in *Treasure Salvors I,* 569 F.2d 330 (5th Cir. 1978). (App. Pet. Cert. 70-104). On appeal in this proceeding, the Fifth Circuit affirmed on the alternative holding that the suit was not barred by the Eleventh Amendment and expressly declined passing on whether the State was bound:

> This Court declines to either affirm or reverse the trial judge's innovative res judicata analysis. The preclusion issues raised by the district court's opinion are reserved for another day.

(App. Pet. Cert. 23, n. 17).

Previously in *Treasure Salvors I,* the Fifth Circuit had modified the trial court's judgment that Treasure Salvors had title against the world to those who were parties and privies to the litigation. 569 F.2d at 335-36. Pursuant to the mandate in *Treasure Salvors I,* the trial court then ruled in the present hearings that the State was bound under the terms of the mandate as it was in privity and had failed to intervene. (App. Pet. Cert. 70-104).

The failure of the State to intervene is a valid basis to affirm the result below, particularly as it would obviate the Eleventh Amendment arguments made by Florida. The United States' claim to articles of salvage from the *Atocha* included those articles in possession of the State. As the District Judge remarked, if the United States had won, it would have received title to the *res.* (R.v. IV 22-23). If the State had intervened, *claiming against the United States*, it would have had no basis to assert an Eleventh Amendment defense. Thus under these circumstances, holding the State bound for failure to intervene is not depriving the State of an Eleventh Amendment objection that it otherwise would have had. *cf. Montana v. United States*, 440 U.S. 147 (1979) holding the United States to have been in privity with a private party and collaterally estopped by the earlier litigation.

The trial court's ruling was based on findings of fact that: 1) the Division and Treasure Salvors were disputing the terms of their contract governing disposition of the artifacts *before* Treasure Salvors and the United States began their litigation over ownership of *all* the treasure—including that held by the Division of Archives; 2) the Division of Archives did not intervene, even though it had an absolute right to do so; 3) the Division of Archives knew of and participated in that suit; 4) the Division of Archives knew that the suit was an *in rem* proceeding brought to settle, for all the world, the ownership rights to the treasure; 5) the Division of Archives assisted the United States in its litigation against Treasure Salvors; 6) the Division of Archives relied on the United States to protect its interests, which were in repudiation of its fiduciary duties under the purported salvage agreements with Treasure Salvors; 7) prior to and during the suit, the Division of Archives negotiated with the United States to obtain an antiquities permit for the wreck site; 8) an attorney from the Division of Archives assisted the federal government in its litigation; 9) the Division of Archives negotiated with the United States regarding division and disposition of the

treasure, on the assumption that the United States would prevail. (App. Pet. Cert. 74-104).*

Meenan, in "*Marine Antiquities Preservation*," 15 San Diego Law Rev. 623, 640-41, n. 86 (1978), quotes from an interview with Michael W. Reed, Attorney, United States Department of Justice, Attorney for the United States in *Treasure Salvors I*, 569 F.2d 330, and reveals that not only did the State of Florida participate in the federal government's case, but *specifically requested* that the Department of Justice "intervene to protect" the State's claim to the articles of salvage "*now determined to lie on the outer continental shelf.*" *Id.* at n. 86, 641.

The trial court's memorandum order stated:

> If the Division of Archives is in privity there is no question that it would be bound by the judgment and its argument against jurisdiction would be of no avail.

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*The Division knew of the pendency of the suit and what the suit was about. R.v. IV 13-27. Inquiring about the State's involvement with the Federal Government, the court below asked the Director of the Division: "You had talked to the Federal Government people. You had decided among yourselves that the Federal Government people would bring the lawsuit claiming the whole title to the whole thing, and as a result of it, you would—your Department would receive a certain percentage of whatever artifacts were recovered. Isn't that true?" The Director admitted their involvement. R.v. IV 20. The record also clearly reflects that the Director was attempting to be evasive. The Court rephrased the inquiry in order to get a clearer response: "What he is talking about is your knowing of the pendency of the suit and generally the subject matter that the suit was about." R.v. IV 20. The Director then answered: "Yes, sir, no question about that." R.v.IV 20.

> . . . The record reflects an involvement by the Division of Archives with the United States, together with a bypassing of an opportunity to intervene, which warrants a holding that the Division is and should be bound.

(R.v. II 481-2).

The trial court made extensive findings on the issue of privity and failure to intervene. (App. Pet. Cert. 70-104, 117-142). Florida in its brief to the Fifth Circuit did not specifically challenge any of the facts found to be clearly erroneous or raise the matter as an "Issues Presented" in its brief. Under these circumstances, this Court may affirm on the basis of the trial court's findings that the State is bound by the judgment in *Treasure Salvors I.*

All of the reasons given by this Court in its decisions extending issue preclusion to non-parties are also present here. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979); *Montana v. United States*, 440 U.S. 147 (1979). The State should not be allowed to litigate by proxy and both avoid res judicata and waiver of immunity.

V. THE PUBLIC INTEREST IS BETTER SERVED BY TREASURE SALVORS OBTAINING POSSESSION.

The archaeological interest professed by the State to these objects of salvage is inapplicable to Eleventh Amendment immunity, however, because of the extensive references to this issue by the State, a brief response is warranted. A compelling misconception, because one would want to believe it, is that a state bureaucratic agency is more dedicated and better qualified to develop, display and disseminate the data originating from the salvage of marine "artifacts" than are treasure hunters. Indeed, the State insinuates that it is protecting "Florida" artifacts and is placing them on display for its citizens. The proof reveals quite a different picture. The State did not aid in the archival research, location, discovery or salvage of the *Atocha.* (R.v.

IV 105-6). The State has been a poor curator, losing 573 items including a valuable emerald, (R.v. V 25). Many of the coins retained by the State were still uncleaned five years after the State took them. (R.v. V 26). The State attempted to keep without division some of the latest salvaged articles and other precious items. (R.v. V 48-9). The State's Archaeological work was minimal. (R.v. V 25). When the 9 bronze cannons were found, an amazing discovery which conclusively identified the wreck as the *Atocha*, the State tried to deny the importance of the find. (R.v. V 13.)

Treasure Salvors brought outstanding experts from all over the world to aid in verifying the finds, (R.v. V 19, 20), while the State has never acknowledged the wreck to be the *Atocha* (R.v. IV 103), and has accused Treasure Salvors of bringing the cannons from another site. (R.v. IV 104). All of the archival research, which provided conclusive identification of the wreck, was done by Treasure Salvors, (R.v. V 105), which kept meticulous records, photographing each item, logging it in. (R.v. V 46, 47, 48; R.v. IV 197, 198). Common sense and experience tell any salvor that unless adequate records are maintained and provenience preserved, the value of salvage is dramatically reduced.

Contrast the State's meagre display of 6 to 9 items out of the tens of thousands the State held for five years, (R.v.V 100) with Treasure Salvors sponsoring numerous publications to a broad demographic market. *e.g., Free Enterprise Magazine, Reader's Digest, Time, Newsweek, Oceans, N.Y. Times, Playboy, National Geographic,* a book by Robert Daily entitled *Treasure*; Burgess, *They Found Treasure;* and sponsoring exhibits: February 1976, Cape Coral, Florida; June—September 1976, National Geographic, Washington, D.C. February 1977; Atlanta Peach Tree Plaza; April 1977 Museum of Art and History, Cincinnati, Ohio; 1978 Ocean Society of Australia, New Zealand. (R.v. IV 188-190; R.v. V 10-12, 21-22).

Treasure Salvors explored 320,000 linear miles of ocean in its search, (R.v. IV 183), at an expenditure of $5,000,000 and

the loss of four lives, including that of the oldest son of its president Mel Fisher, (R.v. IV 187, 188), and they never lost a coin. R.v. IV 194. Eighteen thousand Spanish documents relating to the *Atocha* and its sister ship were collected, including the manifest of the *Atocha* on the fatal voyage. (R.v.IV 196, 197, 198). The State has only obstructed the archaeological salvage, removing all identifying marks from three-fourths of the items turned over to Treasure Salvors at division [over the protest of Treasure Salvors] (R.v. V 24, 40), requiring Treasure Salvors to use their own museum curator and other personnel to restore the provenience data. (R.v. V 24). Treasure Salvors had set up an accurate underwater grid system and a corridor of spar buoys, and by this means the provenience of every item was provided by Treasure Salvors, but destroyed by the State upon division. (R.v. V 40).

For a complete historical account of the search, the careful attention to the preservation of data, see Lyon, *The Search for the Atocha*, (Harper & Rowe 1979) where the work of Duncan Matthewson, archaeologist for Treasure Salvors is extolled, *Id.* 225. "His work was studded with detail; he had meticulously examined the site and the artifacts that had come from it." His thesis insured, "That, whatever happened to the salvors efforts, the basic facts about the ship, with which we had all come to identify ourselves so closely, would be recorded." The problems and techniques of shallow ship wreck archaeology with particular reference to the *Atocha* are set out in Duncan's thesis, Exhibit 1 to the hearing on the Supersedeas Bond. (R.v. V 48-49).

The National Geographic Society produced an hour long documentary bringing to life the loss of the *Atocha* and the struggles, trials and tribulations of Treasure Salvors in locating and salvaging her. The film uses no actors and depicts accurately the events portrayed. (R.v. IV 57, 233. Treasure Salvors Exhibit 10.)

Salvage activities have continued on th *Atocha* to the present and in subsequent proceedings the Honorable Sydney Aronovitz, United States District Judge for the

Southern District of Florida in his Final Order Extending Preliminary Injunction in this cause (No. 75-1416, S.D.Fla.), dated June 2, 1981, held that:

> The uncontroverted evidence shows that [Treasure Salvors] have exhibited a keen awareness of the historic and archaeological importance attributed in general to old wreck sites, but specifically to the Atocha and Santa Margarita sites . . . This has included substantial expenditures for such historical and archaeological services [as preserving and restoring finds], the providing of work space for archaeological personnel with storage facilities . . ., laboratories, chemicals and supplies . . . very substantial efforts have been maintained and strict control measures introduced to preserve the public interest in the protection of the historical and archaeological values associated with the finding of the Atocha and the Santa Margarita.

The State suggests that its ownership will ensure the preservation of the archaeological material on the continental shelf while private ownership will destroy it. This premise deserves comment. Adam Smith in *An Inquiry Into the Nature and Causes of the Wealth of Nations*, (U. Chi. Britannica ed. 1952) stated an opposite view:

> Every individual is continually exerting himself to find out the most advantageous employment for whatever capital he can command. It is for his own advantage, indeed, and not that of the society, which he has in view. But the study of his own advantage naturally, or rather necessarily, leads him to prefer that employment which is most advantageous to the society. *Id.* at 193.

"The invisible hand" guides the free enterprise system which underlies our nation. Government intervention often harms the process. The underlying thesis of the State's and Amici's interest in archaeology is the need for a state

bureaucracy. Notwithstanding that the states have limited resources for such purposes as education, law enforcement, highways and social programs, increased intervention by a multiple number of states with disparate statutes in attempts to control maritime salvage over areas *beyond* the territorial boundary of the United States cannot be justified. Whether or not the states within the territorial waters of the United States can control and regulate maritime salvage is not an issue presently before this Court.*

Friedman in *Capitalism and Freedom* (U. Chi. 1962) affirms Adam Smith's thoughts:

> Is it an accident that so many of the governmental reforms of recent decades have gone awry . . .?
> The central defect of these measures is that they seek through government to force people to act against their own immediate interests in order to promote a supposedly general interest. They substitute the values of outsiders for the values of participants; . . . These measures are therefore countered by one of the strongest and most creative forces known to man—the attempt by millions of individuals to promote their own interests, to live their lives by their own values . . . The interests of which I speak are not simply narrow self-regarding interests . . . they include the whole range of values that men hold dear and for which they are willing to spend their fortunes and sacrifice their lives . . . and devote great effort and time to charitable, educational and religious activities. Naturally, such interests are the major ones for few men. It is the virtue of a free society that it nonetheless permits these interests full scope and does not subordinate them to the narrow materialistic

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*See *Cobb Coin Company, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel,* No. 79-8266-Civ-JLK, S.D. Fla., *Order Granting Plaintiff's Motion for Preliminary Injunction,* dated October 2, 1981, for full discussion of problem.

> interests that dominate the bulk of mankind. That is why capitalist societies are less materialistic than collectivist societies.

Id. at 200.

The facts underscore this view. The plaintiffs have a major interest in searching for, finding and salvaging Spanish Treasure Ships. Gores, *Marine Salvage*, (Doubleday, 1971) at 400-404 recognizes their ability. The plaintiffs have spent nine years of research and substantial amounts of risk capital finding and salvaging this wreck. With today's straitened public budgets, the State would never have funded the search, much less commenced salvage. Treasure Salvors saved valuable resources for the public that otherwise would have been lost. To suggest that leaving these resources subject to the perils of the sea would better serve the public weal is idiocy.

By comparison, the State has *never* undertaken archaeological marine salvage and has neither plans nor a budget to do so. As the trial court notes, "there is no basis in fact for suggesting that the Division ever could have located [the *Atocha*], much less recovered it." (App. Pet. Cert. 69).

Shore, *Marine Archaeology and International Law: Background and Some Suggestions*, 9 San Diego L. Rev. 668, 690 (1970) comments on the interests of private salvors serving the public good:

> While property rights in such finds should be subject to some sort of control, it would be unwise for a coastal state to automatically assert ownership of marine archaeological material based solely on that material's presence *within territorial jurisdiction.* Many such states lack the resources for conducting their own exploration and excavation. Private backing, then, can and does play an important role in the discovery of our archaeological heritage . . . most private backers, who acquire ownership of such material *care for it as well as,*

or better than many museums can. Private collectors of marine archaeological artifacts also take great pride—for whatever reasons—in lending their collections to museums for occasional showings. Since the ultimate goal of marine archaeology is to "illustrate and discover the course of human civilization," and since privately backed exploration and excavation can be of great assistance in ataining this goal, any property laws which would discourage such backing should be frowned upon, with the one exception for finds which a coastal state considers necessary to build up collections "fully representative of that country's civilization, history, art and architecture." (emphasis added).

Policy as well as legal considerations enforce the claim of Treasure Salvors. Had it not been for the enterprise of the plaintiffs, the wreck of the *Atocha* would still lie undiscovered and lost. "A wise and frugal government . . . shall leave men otherwise free to regulate their own pursuits of industry and improvement, and shall not take from the mouth of labor the bread it has earned—this is the sum of good government." Thomas Jefferson, Writings. See also Note, *Admiralty Law: Trial of a Treasure Hunter*, 4 Nova L. Jour. 237 (1980).

CONCLUSION

For the foregoing reason, the judgment below should be affirmed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

STATE OF FLORIDA
DEPARTMENT OF STATE,

Petitioner,

-vs-

TREASURE SALVORS, INC.
ARMADA RESEARCH CORP.,

Respondents.

REPLY BRIEF FOR PETITIONER

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No. 80-1348

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

STATE OF FLORIDA
DEPARTMENT OF STATE,

Petitioner,

-vs-

TREASURE SALVORS, INC.
ARMADA RESEARCH CORP.,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

ARGUMENT

I. THE ELEVENTH AMENDMENT BAR TO FEDERAL JURISDICTION IS NOT RESTRICTED TO PROCEEDINGS WHICH MAY AFFECT THE FISC OF THE STATE, BUT IS APPLICABLE IN ANY CASE WHEREIN A STATE IS SUMMONED BY A CITIZEN INVOLUNTARILY INTO FEDERAL COURT.

At the heart of Respondents' argument is their insistence that the eleventh amendment precludes federal jurisdiction only when the relief sought would impact upon the fiscal integrity of the state. Respondents' Brief pp. 14-17. In effect, Respondents argue that the stringent standards for waiver of eleventh amendment immunity have been relaxed since the decision in Edelman v. Jordan, 415 U.S. 651 (1974). This Court has, however, squarely rejected the suggestion that its decision in Edelman has been eroded or should be overruled.

In Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Association, ____ U.S. ____,101 S.Ct. 1032 (March 2, 1981) [hereinafter Florida Nursing Home], the Court rejected a plea to hear argument whether Edelman should be overruled (see concurring opinion of Justice Stevens, 101 S.Ct. at 1034-35), ruling instead:

> The analysis in this case is controlled by our decision in Edelman v. Jordan . . ., [where] we stated that "we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'"

101 S.Ct. at 1034. The Court in Florida Nursing Home went on to reaffirm its holding in Smith v. Reeves, 178 U.S. 436 (1900), that a state's waiver of sovereign immunity "'does not constitute a waiver by the state of its constitutional

immunity under the eleventh amendment from suit in federal court.'" 101 S.Ct. at 1034.

The test enunciated in Edelman is not, as Respondents suggest, limited to "the fisc of the state." Neither Edelman, Florida Nursing Home, nor any other decision of this Court so states. Petitioner's Brief pp. 26-44. Although the major concern during the ratification process of the eleventh amendment was to protect the treasuries of the states and to overrule Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), there is nothing in the Amendment itself that limits its application to matters involving the fisc of the state. Jagnandon v. Giles, 538 F.2d 1166, 1172-73 (5th Cir. 1976), cert. denied, 432 U.S. 910 (1977).

Chief Justice Hughes, in a case in

which an ancillary and supplemental complaint had been filed against the State of Missouri[1] to enjoin it from prosecuting a probate matter, offered the following expansive view of the scope of the eleventh amendment:

> The fact that the motive for the adoption of the Eleventh Amendment was to quiet grave apprehensions that were extensively entertained with respect to the prosecution of State debts in the Federal courts cannot be regarded, as respondents seem to argue, as restricting the scope of the

---

[1] Treasure Salvors,too, filed a "Supplemental Complaint for Declaratory, Injunctive and Other Relief" on April 17, 1978, R 369-380, after the Fifth Circuit's opinion in Treasure Salvors I was handed down.

> Amendment to suits to obtain money judgments. The terms of the Amendment, notwithstanding the chief motive for its adoption, were not so limited. Expressly applying to suits in equity as well as at law, the Amendment necessarily embraces demands for the enforcement of equitable rights and the prosecution of equitable remedies when these are asserted and prosecuted by an individual against a State. This conception of the Amendment has had abundant illustration. . .(citations omitted)

Missouri v. Fiske, 290 U.S. 18, 27 (1933); see also Louisiana v. Jumel, 107 U.S. 711 (1883). And later, in language very relevant to the case at bar:

> This is not less a suit against the State because the bill is ancillary and supplemental. The State had not been a party to the litigation which resulted in the decree upon which respondents rely. The

> State has not come into the suit for the purpose of litigating the rights asserted. Respondents are attempting to subject the State, without its consent, to the court's process. . . [emphasis supplied]
>
> The fact that a suit in a federal court is in rem, or quasi in rem, furnishes no ground for the issue of process against a non-consenting State. If the State chooses to come into the court as plaintiff, or to intervene, seeking the enforcement of liens or claims, the State may be permitted to do so, and in that event its rights will receive the same consideration as those of other parties in interest. But when the State does not come in and withholds its consent, the court has no authority to issue process against the State to compel it to subject itself to the court's judgment, whatever the nature of the suit.

Id. at 27-28; accord, Knight v. New York, 443 F.2d 415 (2d Cir. 1971) (where plaintiff brought suit against the State of New York for the return of real

property, the Court of Appeals held that the eleventh amendment barred the action since at the time of suit, title had vested in the state and plaintiff's suit therefore would require affirmative action by the state to return the property).

The sole teaching of Edelman is that a waiver of eleventh amendment immunity may be found only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction", quoting Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909).

A state clearly has the prerogative to consent to suit in its own courts without waiving its eleventh amendment immunity from suit in federal court.

Smith v. Reeves, 178 U.S. 436 (1900). Mere legislative consent for a state agency to "be sued" is insufficiant to waive eleventh amendment immunity from suit in federal court. Ford Motor Company v. Department of Treasury of State of Indiana, 323 U.S. 459 (1945); McDonald v. Illinois, 557 F.2d 596 (7th Cir. 1977), cert. denied, 434 U.S. 966; Martin v. University of Louisville, 541 F.2nd 1171 (6th Cir. 1976). As the Fifth Circuit stated in Jagnandan v. Giles, 538 F.2d 1166, 1177 (5th Cir. 1976), cert. denied, 432 U.S. 910 (1977):

> Waiver of a state's constitutional immunity must appear clearly and will not be easily implied. An immunity waived for state suit purposes does not necessarily waive immunity for federal courts.

Respondents' argument that the Court should disregard the eleventh amendment

because "the public interest is better served by Treasure Salvors obtaining possession" (Respondents' Brief pp. 42-48) ignores the teaching of Edelman that the Amendment "'declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force' as to represent a jurisdictional bar which may be raised at any point in the proceedings, even for the first time on appeal." Edelman, supra, at 678, quoting Ford Motor Co. v. Department of Treasury of State of Indiana, 323 U.S. 459, 466-67 (1945). In this case, the State of Florida did not, of course, raise the eleventh amendment bar for the first time on appeal, but raised it at the evidentiary hearing, R.V. III, 63-65, and by way of pre- and post-trial memoranda. R. 422-23; 425-40.

Nothing in Respondents' Brief refutes the plain fact that its eleventh amendment immunity from suit in federal court has been waived by the State of Florida in this case. Furthermore, by virtue of clear and controlling precedent, the federal courts lack jurisdiction to hear the substantive issue presented by Respondents. If this Court is to consider the substantive issue, the eleventh amendment mandates that it can only do so when it receives a petition from a ruling of the appropriate state judicial forum.

II. WHETHER FLORIDA HAS WAIVED ITS ELEVENTH AMENDMENT IMMUNITY IS A QUESTION OF STATE AND NOT FEDERAL LAW.

Respondents argue that, under Fla. Stat. §69.041 (1979), the State of

Florida is claiming a "salvage lien" upon the remains of the Atocha in its possession[2] and that any dispute as to the State's waiver of the eleventh amendment under the statute "is in itself a federal question of which this Court is the ultimate arbiter." Respondents' Brief p. 26. Respondents cite only Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275 (1959) as authority for their assertion. The State submits that Petty does not support or imply the proposition. Petty, involving an interstate compact entered into under Congressional approval, holds that any issue as to a state's waiver of eleventh amendment immunity under the compact must necessarily be a question of

---

[2]Respondents' Brief pp. 24-26.

federal, and not state, law. 359 U.S. at 278-79.

Absent a Petty-type situation, however, whether or not a state has consented to be sued in the federal courts is a question of state law. Ford Motor Co. v. Department of Treasury of Indiana, 323 U.S. 459, 465-69 (1945); Dagnall v. Gegenheimer, 631 F.2d 1195 (5th Cir. 1980), aff'd on rehearing, 645 F.2d 2,3 (5th Cir. 1981). Dagnall was a negligence action against the Louisiana Department of Highways in which the state sought a favorable verdict and lost before a jury. In a motion for a judgment notwithstanding the verdict, the state argued for the first time that the trial court lacked jurisdiction under the eleventh amendment. "The trial court held that the Department had waived its

eleventh amendment immunity by its pre-trial stipulation that it was amenable to suit and by failing to raise the jurisdictional issue until after trial." 631 F.2d at 1196. On appeal, the Court of Appeals vacated the judgment, saying:

> Because the State of Louisiana is immune from suit in federal court by a citizen of another state, and because Louisiana has not waived this eleventh amendment immunity, the trial court was without jurisdiction and so are we.

Id.

Similarly, in Freimanis v. Sea-Land Service, Inc., 654 F.2d 1155 (5th Cir. 1981), the Court of Appeals held that Louisiana did not waive its eleventh amendment immunity by entering into a consent judgment for damages suffered by plaintiff in a maritime collision. The court said:

> The short answer to [the contention that immunity was waived] is that the attorney for the Department had no clearly expressed authority to waive eleventh amendment immunity. Indeed, Louisiana has clearly expressed its intention to preserve its immunity.

654 F.2d at 1160.

The assertion that questions regarding waiver of the eleventh amendment are to be determined in state tribunals is one whose far-reaching implications were explored in Linkenhoker v. Weinberger, 529 F.2d 51 (4th Cir. 1975), an action wherein the Attorney General of Maryland, in an effort to keep the case alive, represented to the court of appeals that Maryland waived its eleventh amendment immunity. 529 F.2d at 53. Despite the Attorney General's representation, the court was constrained by

Ford Motor Co.'s holding "that a state attorney general could not waive the state's eleventh amendment immunity unless he had been properly authorized by state law to so do." Id. The court held that it had no jurisdiction to consider the claims against Maryland and vacated the judgment of the district court. Id. at 54.

III. THE STATE OF FLORIDA HAS EXERCISED A VALID AND APPROPRIATE POLICE POWER IN ITS EFFORTS TO PRESERVE AND PROTECT ITS MARITIME CULTURAL HERITAGE--A POWER WHICH IS NOT THE SUBJECT OF TRADITIONAL FEDERAL REGULATION.

Respondents, through the procedural smokescreen of bringing an in rem action in admiralty, have attempted to side-step the eleventh amendment's bar to this suit by arguing that, under step two of the Ford Motor Co. test, the State has waived its sovereign immunity by statute and by

participation in an area subject to exclusive federal control. To the contrary, the state-supervised recovery of archeological remains which happen to lie on submerged lands does not require a court of admiralty to exercise jurisdiction when legal disputes arise, any more than does the recovery of archeological remains on dry land. See, e.g., State v. Massachusetts Co., 95 So.2d 902 (Fla. 1956); cert. denied, 355 U.S. 881; State v. Flying "W" Enterprises, Inc., 160 S.E.2d 482 (N.C. 1968); State v. Armistead, 200 S.E. 2d 226 (N.C. App. 1973).

Respondents suggest that the State has claimed a "salvage lien" and has thus waived sovereign immunity under Fla. Stat. §69.041 (1)(b)(1979). The State of Florida has not claimed a lien on the

artifacts; it has claimed ownership--through fully executed contracts. JA 44. Furthermore, Respondents' back-door entry into admiralty court, through the use of salvage lien principles, is unprecedented and unnecessary, in terms of disputes over the ownership of marine artifacts.

Respondents' waiver argument is predicated upon a fallacy: that the State's claim to the artifacts is in effect a lien for salvage and, concomitantly, that an admiralty court is the only forum in which a salvage lien contest can be heard. "However, the class of legal situations in which maritime liens arise has long since been determined, and new types of liens may not arise by analogy or by judicial fiat." Vazman, S.A. v. Fidelity International Bank, 418 F.Supp. 1084,

1086 n. 5 (S.D. N.Y. 1976).

> An Admiralty Court cannot create a maritime lien. The Lottawanna, 21 Wall. 558, 88 U.S. 558, 22 L.Ed. 654. Maritime liens are stricti juris and cannot be extended argumentatively or by analogy or inference.

United States v. Oil Screws Ken. Jr., etc., 275 F.Supp. 792, 796 (E.D. La. 1967).

> [T]his [maritime] privilege or lien, though adhering to the vessel, is a secret one; it may operate to the prejudice of general creditors and purchasers without notice; it is therefore "stricti juris," and cannot be extended by construction, analogy or inference.

Osaka Shosen Kaisha v. Pacific Export Lumber Co., 260 U.S. 490, 497 (1922).

> [A]dmiralty law has long ago ceased to create new liens. The only liens recognized today are those created by statute and those historically recognized in maritime law.

In Re: Admiralty Lines, Ltd., 280 F. Supp. 601, 604-05 (E.D. La. 1968), aff'd, 410 F.2d 398 (5th Cir. 1969). See also European-American Banking Corp. v. M/S Rosaria, 486 F.Supp. 245 (S.D. Miss. 1980); Fathom Edpeditions, Inc. v. M/T Gavrion, 402 F.Supp. 390 (M.D. Fla. 1975).

Furthermore, Chapter 267, Florida Statutes, which serves to preserve and protect marine antiquities of cultural or historical value, promotes an interest unprotected by traditional admiralty law. The maritime law of salvage constitutes a reasonable system where speed and efficiency are required to recover property or preserve human life which is in immediate maritime peril. But salvage law's traditional emphasis on prompt action is entirely unsuited to the

promotion of cautious, painstaking, archeological recovery of artifacts and other items lost or abandoned at sea. "The business of searching for and recovery from the bottom of the sea, treasure and artifacts lost centuries ago is not the business of saving property shipwrecked and in distress. . ." In re: Andrews, 266 F.Supp. 162, 164 (M.D. Fla. 1967). Consequently, traditional salvage law fails to provide for the specialized problems of marine archeology. Salvage's fundamental emphasis on speed of action is utterly antithetical to the general needs of archeology and history, and the specific requirements for the preservation of the immeasurable cultural heritage found in the wreck-sites along the Florida coast.

Moreover, admiralty courts traditionally have limited the application of salvage concepts to the recovery of actual vessels and cargoes located on actual vessels. Admiralty courts consistently have declined to exercise jurisdiction over the recovery of property other than vessels able to engage in navigation. Apparently, admiralty courts have exercised extreme caution in extending admiralty's emphasis on speed of action to marine recoveries not necessitating prompt activity.

The classic statement of this limiting doctrine appears in The Hendrik Hudson, 11 Fed.Cas., 1085, No. 6.355 (S.D. N.Y. 1869). The case involved an alleged in rem action, based on salvage principles, against a dismantled, non-motive hulk, which was intended to become

a hotel. The hulk sank in the Hudson River while being towed to a new location. A passing vessel raised the hulk by pumping out enough water to allow it to float to the surface. The salving vessel then sought a maritime lien against the hulk to guarantee payment for the salvage services. The Court stated:

> Although this hulk or structure had been a vessel, in the full sense of the term, and subject to the admiralty and maritime jurisdiction of. . . the United States, and although its form and shape under water continued to be those of a vessel, yet I think that, in the actual circumstances of its physical existence, this court was and is without jurisdiction over it in rem, in respect of the claim sued on in this suit. This hulk was not, in any proper sense, engaged in commerce or navigation. A floating house of religious worship, or a floating swimming bath, or a floating residence, could be

> towed, and, in such sense, navigated, but such a structure could not be engaged in navigation, in such a sense as to be liable in rem, in the admiralty, for a service like the present one. The fact that the structure was the shape of a vessel, or had been once used as a vessel, or could, by proper appliances, be again used as such, cannot affect the question. The test is, the actual status of the structure, as being fairly engaged in commerce or navigation. . .

Id. at 1086. Accord, Hayford v. Dousony, 32 F.2d 605 (5th Cir. 1929) (floating barge used for dancing pavilion held not subject to maritime lien); The Jefferson, 158 F. 358 (E.D. Va. 1908) (salvage law inapplicable to steamship in dry dock); Cope v. Vallette Dry Dock, 16 F. 924 (E.D. La. 1883) (dry dock moored to bank for 14 years not subject to salvage law principles).

In the instant case, no "vessel" exists. The wooden frame of the Atocha disintegrated long ago, and the wreck-site today consists only of coral-encrusted metal pieces and remains of the actual vessel which are scattered below the ocean floor. An admiralty court applying the established rule of The Hendrik Hudson simply should not assert jurisdiction over such a res, and consequently, a state court is the proper forum to hear any disputes over ownership of that res.

Section 267, Florida Statutes recognizes the manifest inapplicability of traditional salvage concepts to the recovery of artifacts from Florida's

wreck-sites,[3] and is entirely consistent with the line of cases, out of both this Court and various Circuit Courts of Appeal which have held that the goal of preserving structures and areas of particularly historic, cultural, or archeological significance is an entirely proper subject of a state's exercise of its police power. See Petitioner's Brief pp. 66-71.

Section 267 in fact constitutes a carefully planned program designed to emphasize the preservation of wreck-sites and their artifacts through state-controlled, state-of-the-art archeological efforts. The statute represents

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[3] An invaluable discussion of the public benefit provided by skilled archeologists operating under Section 267 appears in R. Burgess & C. Clausen, Gold, Galleons & Archeology ch. 15, at 141-150 (1976).

the combined efforts of lawyers, legislators, historians, and marine archeologists, all vitally concerned with the preservation of Florida's uniquely fascinating heritage.

Regulations promulgated under the authority of §267.061 indicate the practical effect of the section. The regulations authorize the State Division of Archives to enter into contracts for exploration and salvage operations conducted on state-owned submerged lands. Fla. Ad. Code ch. 1A-31.01(1). The Division, however, may only enter into salvage and exploration contracts after determining the ability of the party seeking the contract to explore or salvage in a competent, professional manner. Id., ch. 1A-31.03(2). The

Division also must strictly limit the use of prop-wash excavating devices,[4] and must approve the use of any other means of exploration or salvage on a given site.[5] Id., ch. 1A. 31.03(3). Most importantly, the Division must retain

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[4] A prop-wash, or "sand-blaster" device, directs a violent jet of air from a ship's propeller to the ocean floor below. The enormous blast of air will dig a huge hole in a matter of minutes.

[5] Any gold or silver artifacts caught in the blast will sink to the bottom of the hole for easy recovery by divers; glass, porcelain, and intricate metal-work will be blown to pieces.

> On its first trial the blaster exceeded all expectations . . . it sounded like sixteen jet fighters roaring off the runway at the same time it blew and off the bottom of the Wabasso harbor for two hundred feet or more it blasted not only modest holes but elephantine pits.

Burgess & Clausen, supra note 2, at 129.

complete supervisory control over the exploration or salvage operation, and at least one agent of the Division must be at the site at all times, to ensure that the operation is conducted in an archeologically responsible manner and to catalog recovered items. Id., ch. 31.10.

The regulations, however, do not benefit the State and its cultural heritage to the exclusion of the private salvor. The regulations benefit salvors in several ways. First, the regulations substantially increase the value of a find, since State supervision and cataloging ensures authenticity and thereby attracts [6] investors. Thus,

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[6] The "salting" of wreck-sites and the production of counterfeit artifacts is a very real and severe problem. See Burgess & Clausen, supra note 2, at 133-37.

although the State generally retains 25% of recovered items and artifacts, relinquishing the remaining 75% to the successful salvor, the State authentication process may nearly double the value of the 75% which goes to the salvor. Additionally, the State's archeologist commonly provides professional advise and experience to the private salvor. The State also provides sophisticated equipment for immediate processing of recovered artifacts, which is necessary because recovered marine artifacts begin a rapid deterioration process in the open air. Lastly, the State Marine Patrol keeps all other parties off of the wreck-site being worked under State lease. Thus, the State program removes

the threat of claim-jumping by rival salvors.[7]

Without the State's salvage contract program, salvagers would be in the position of warring for shipwreck sites, seeking to oust each other from promising areas. Furthermore, few, if any, salvage companies have the sophisticated laboratory facilities and equipment which the State has, or the State's technical and professional personnel--archaeologists, chemists, metallurgists, photographers,

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[7] Attempted site-jumping involving gun-fire and threatened violence reportedly has occured at wreck-sites beyond the State's jurisdiction. See Treasure Salvors, Inc. v. Unidentified, Wrecked etc. (Treasure Salvors III), 640 F.2d 560, 564 (5th Cir. 1981).

illustrators, and historians--whose expertise is necessary for the preservation and analysis of recovered artifacts.

The danger to recovered artifacts which have not been processed through the State's laboratory is illustrated by the deterioration of cannons and other objects which have been taken from wreck-sites by unauthorized salvors. Cannons recovered by authorized salvors are stored immediately in conditions approved by the State Marine Archeologist. They are then subjected to up to fourteen months of stabilization and processing in the State laboratory, and finally, are coated with high-density paint. The cannons' forms and markings will remain fully preserved after such special treatment and procedures.

In contrast, unprocessed cannons begin an immediate deterioration process, and eventually collapse in on themselves. The deterioration process is irreversible. Once a careless or callous salvor has recovered a cannon and exposed it to the air, deterioration commences, and the beauty and value of the cannon is lost forever. Precisely the same process occurs with other iron weapons, eating utensils, sextants, and wooden block-eyes and other wooden objects. Glass and porcelain artifacts, of course, do not deteriorate in the same fashion as iron and wooden artifacts. Nevertheless, any salvor choosing to blast and excavate with a prop-wash device can destroy glass and porcelain equally as effectively, and even more quickly, than deterioration can destroy unprocessed cannons.

Should the Court hold that this case was properly brought in admiralty court (Chapter 267 notwithstanding) and that the eleventh amendment does not bar the suit, then the State's ability to operate a plan which protects both the interest of the people in preserving their cultural heritage and the interest of individual salvage companies in receiving just compensation for their salvage efforts will be effectively abrogated.

None of the benefits of the State leasing program are derived from, related to, or available under strict admiralty law. Traditional admiralty rules provide no incentive to salvage in a controlled and archeologically responsible manner. To the contrary, traditional admiralty rules encourage salvors to act rapidly and with brutal efficiency. Moreover,

admiralty judges are not archeological experts, and could not independently determine the most responsible excavating process for a given site. Nor could an admiralty court provide independent authentication and prompt, scientific processing of recovered artifacts.

Thus, section 267 and the regulations promulgated thereunder function in an area which appears to be "maritime" at first glance, but is actually alien to admiralty law. Section 267, far from operating in derogation of admiralty law, operates in an area unknown to traditional admiralty law. Accordingly, the State's claim of ownership of these artifacts is not in the form of a lien and the waiver of immunity from suit in federal court via Fla. Stat. §69.041(1)(b)is wholly inapplicable to the present fact

situation--especially in light of the admonition in Edelman v. Jordan, 415 U.S. at 673 (that statutes which purport to waive sovereign immunity must be construed strictly) and Manatee County v. Town of Longboat Key, 265 So.2d 143 (Fla. 1978) (that the State Constitution mandates that unambiguous statutory language must be used in order to effect a waiver of sovereign immunity). See also Kirk v. Kennedy, 231 So.2d 246 (Fla. App. 1970).

Respondents' contention that Florida has waived its eleventh amendment immunity by participation in an area of traditional federal regulation is similarly ill-considered. The flaw in Respondents' argument is that it is mis-focused: it is not traditional, commercial, maritime salvage in which the

State and Treasure Salvors participated under contract, but instead, the archeological recovery of submerged artifacts. As stated earlier, there is not even the semblance of a vessel buried beneath the sand in this case; what does exist are the scattered remains of a ship and its cargo--or that which has not deteriorated or rusted away during the course of 350 years. There has been no showing that the federal government has a recognizable interest in the archeological protection and recovery of marine artifacts; certainly, it has not statutorily done so, to date. See Treasure Salvors I, 569 F.2d 330, 337-41 (5th Cir. 1978). Indeed, the State of Florida, Department of State would welcome appropriate federal protection of historical shipwrecks, but none has been forthcoming. But see H.R. 132, referred

January 5, 1981 to House Committee on Interior and Insular Affairs and House Committee on Merchant Marine and Fisheries.

CONCLUSION

The Respondents would have this Court restrict the eleventh amendment's application to suits wherein the fiscal integrity of a state may be affected. The Amendment contains no such limitation nor has this Court ever interpreted the Amendment to be so limited. As soon as the trial court below issued its warrant for arrest in rem of subject matter in the possession of the state government, it exceeded its jurisdiction by making the State of Florida an involuntary party to an action which was in essence a contract dispute between it and one of its citizens.

The fact that the property had once lain buried on the bottom of the ocean and not on dry land does not permit a court of admiralty to apply salvage principles in derogation of state laws protecting such antiquities and to undermine the clear message of the eleventh amendment.

Respectfully submitted,

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TREASURE SALVORS, INC.,
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ON WRIT OF CERTIORARI TO THE
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BRIEF OF THE STATES OF ALABAMA, ALASKA, CALIFORNIA BY ITS STATE LANDS COMMISSION AND ITS STATE HISTORIC PRESERVATION OFFICE, HAWAII, ILLINOIS, LOUISIANA, MARYLAND, MASSACHUSETTS, MISSISSIPPI, NORTH CAROLINA, SOUTH CAROLINA AND TEXAS, THE VIRGIN ISLANDS, AMERICAN SAMOA AND THE GOVERNMENT OF GUAM

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NO. 80-1348

IN THE

Supreme Court of the United States

October Term 1980

STATE OF FLORIDA,
DEPARTMENT OF STATE,
Petitioner,

v.

TREASURE SALVORS, INC.,
ARMADA RESEARCH CORPORATION,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

BRIEF OF THE STATES OF ALABAMA, ALASKA, CALIFORNIA BY ITS STATE LANDS COMMISSION AND ITS STATE HISTORIC PRESERVATION OFFICE, HAWAII, ILLINOIS, LOUISIANA, MARYLAND, MASSACHUSETTS, MISSISSIPPI, NORTH CAROLINA, SOUTH CAROLINA AND TEXAS, THE VIRGIN ISLANDS, AMERICAN SAMOA AND THE GOVERNMENT OF GUAM
In Support of the Petitioner, Amici Curiae

INTEREST OF AMICI CURIAE

The *amici* are all states or territories with significant interest in the continued ability of the states to protect and conserve their historic resources, particularly those underwater archaeological artifacts which can form such a special and invaluable link with our past. The opinion below, *State of Florida, Department of State v. Treasure Salvors,* 621 F.2d 1340 (1980), [hereinafter cited as *Treasure Salvors II]* has placed in jeopardy the role of the states in the preservation of our archaeological

heritage. As this Court has noted, speaking through Mr. Justice Brennan in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 108 (1979), quoting Robert Stipe:

> '[H]istoric conservation is but one aspect of the much larger problem, basically an environmental one, of enhancing - or perhaps developing for the first time - the quality of life for people'.[1]

While the substantive aspects of this case are of grave interest to these *amici*, perhaps even more important to the individual states is the direct attack which has been made on the principle of sovereign immunity from suit embodied in the Eleventh Amendment of the United States Constitution. It is this aspect of the case that has led these *amici* to participate in this matter. These *amici* are in full support of the position of the petitioner State of Florida, as set out in its brief, but feel that the special role the Eleventh Amendment protection has served in the formulation and development of this country requires that it be given additional consideration.

The vitality of the Eleventh Amendment has perhaps been lessened in recent years, primarily due to the increased instances in which the sovereign has consented to suit (or waived its immunity); but the instant case presents no instance of established consent, or waiver, by the State of Florida, and involves instead the very basic, purely local, question of contract obligations between a state and one of its own citizens. It is believed that the Court of Appeals for the Fifth

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[1]Gilbert, Introduction, Precedents for the Future, 36 LAW & CONTEMP. PROB. 311, 312 (1971), quoting address by Robert Stripe, 1971 Conference on Preservation Law, Washington, D.C., May 1, 1971 (unpublished text, pp. 6-7).

Circuit has glossed over the fundamental jurisdictional question of suability in order to reach certain implied admiralty questions, which it obviously felt only could be addressed by the federal courts.

This case presents clearly the opportunity for the reaffirmation of the Eleventh Amendment immunity in situations in which consent, or waiver, is not present.

SUMMARY OF ARGUMENT

It is the position of the *amici* that the decision of the Court of Appeals for the Fifth Circuit has placed in jeopardy the fundamental protection the Eleventh Amendment provides to the states. The facts of this case, when boiled down to their basics, reveal nothing more than the intrusion of the federal court into a purely local contractual matter. This is particularly disturbing since the subject matter of the contracts at issue involve an important governmental function - that of locating and protecting our underwater historic and archaeological resources.

The courts below have refused to heed the Eleventh Amendment bar to their jurisdiction in order to reach certain implied admiralty questions. The ruling of the Court of Appeals, that the action is not one against the state, made in connection with determining its jurisdiction, concerns these *amici* states because it leads directly to the principle that an allegation of some illegal action on the part of an officer of the sovereign insures that a claimant may sue the state in federal court. This notion has been rejected numerous times and, in the absence of any allegations of unconstitutional action by the sovereign, the suit should have been dismissed. The state has been called into the federal court, without its consent, in order to retain possession of materials and artifacts obtained through a contractual agreement with one of its own citizens. Such a result is obviously

incompatible with the continued viability of the Eleventh Amendment.

ARGUMENT

I.

THE DECISION BELOW SUBJECTS THE STATE OF FLORIDA TO THE JURISDICTION OF THE FEDERAL COURT IN A PURELY LOCAL CONTRACTUAL MATTER CONCERNING THE PRESERVATION OF ITS HISTORIC AND ARCHAEOLOGICAL RESOURCES, WHICH IS A PROPER GOVERNMENTAL FUNCTION.

This matter has followed a very long and involved procedural path since the discovery of the Spanish ship, *Nuestra Senora De Atocha*, in 1971 by the respondents herein. The history of the search is well documented in *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F. 2d 330 (1978) [hereinafter cited as *Treasure Salvors I*] and in a National Geographic article, Lyon, *The Trouble With Treasure*, 149 National Geographic 787 (June 1976). While the resiliency of the respondents may be perceived by some to add an element of daring and adventure to this case, at issue is not the discovery of the *Atocha*, however exciting; but rather this case concerns the ability to contest in federal court the title to certain goods and artifacts presented to the State of Florida by the respondents, citizens of the State of Florida, pursuant to a series of contracts executed by the parties between 1971 and 1975. Each contract was for a period of approximately one (1) year. Under the contract, Armada Research was to conduct underwater salvage from and upon certain submerged sovereignty lands of, and belonging to, the State of Florida; and the State, *inter alia*, was to provide certain recordation, authentication and evaluation services. Pursuant to the contracts, the

State of Florida received the artifacts and materials which were the subject of the District Court's Warrant for Arrest In Rem. These artifacts and materials were in the lawful possession of the State before Treasure Salvors filed *Treasure Salvors, Inc. v. Abandoned Sailing Vessel,* 408 F. Supp. 907 (S.D. Fla. 1976) in the United States District Court for the Southern District of FLorida.

The State entered the contracts in furtherance of the very great public interest in the location and preservation of the historic artifacts. Perceived in this light, the case strikes at the very heart of the Eleventh Amendment protection previously afforded to the states and calls into question the ability of the states to legislate, and contract, within the area of archaeological preservation, particularly with regard to underwater historic resources. It cannot be disputed that archaeological preservation is indeed important to the states. In 1965, Florida became the first state to specifically include underwater archaeological resources in its antiquities legislation, following the discovery of substantial amounts of treasure in its territorial waters.[2] Florida's Department of State, Bureau of Historic Sites and Properties is charged with the responsibility to:

> Locate, acquire, protect, preserve and promote the location, acquisition and preservation of historic sites and properties, buildings, artifacts, treasure trove, and objects of antiquity which have scientific or historical value or are of interest to the public, including, but not limited to, monuments, memorials, fossil deposits, Indian habitations, ceremonial

[2]FLA. STAT. §§267.01-267.08 (1965), 1965 Florida Laws ch. 66-300, §§1-8, later replaced by FLA. STAT. §§267.011-267.14 (1979), 1967 Fla. Laws ch. 67-50, §§1-11.

> sites, abandoned settlements, caves, sunken or abandoned ships, or any part thereof. FLA. STAT. §267.061(a)(a).

Since that time, eleven other states have expressly included sunken shipwrecks within the protection of their antiquities legislation.[3]

Preserving cultural and historical resources has become a national policy in the United States.[4] Indeed, the United States Supreme Court has long recognized

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[3]GA. CODE §40.813(a)(1978); IND. CODE §14-3-3-3-1(m) (Cum. Supp. 1980); LA. REV. STAT. ANN. tit. 41 §§1601 and 1605 (1974); MASS. GEN. LAWS ANN. ch. 6 §§179-180 (1977); MISS. CODE ANN. §39-7-9 (1972); N.C. GEN. STAT. §§121-22-121-28 (1981); R.I. GEN. LAWS §§42-45.1-3--42-45.1-4 (1977); S.C. CODE §§54-7-210--54-7-280 (Cum. Supp. 1980); TEX. CIV. CODE ANN. tit. 9 §§191.001--191.174 (Supp. 1979); VT. STAT. ANN. tit. 22 §§701, 781-782 (1978); VA. CODE §10-145.9 (Cum. Supp. 1980).

Other states, while not referring to sunken or abandoned ships, include submerged or underwater sites in their protection of archaeological resources. See ALASKA STAT.§§41.35.020 (1977); COLO. REV. STAT. §24-80-401 (1973); HAWAII REV. STAT. §§6E-2 and 6E-7 (1976); ME. REV. STAT. ANN. tit. 27 §§371 and 373 (1969); MINN. STAT. §§138.31 and 138.37 (1980); OR. REV. STAT. §§273.705(a), 273.722, 273.728, 274.005(7), 274.025 (1979); WASH. REV. CODE §27.53.040 (1979); WIS. STAT. §§27.012(1)--27.012(9) (1975).

[4]Note, *Cultural Resources Preservation and Underwater Archaeology: Some Notes on the Current Legal Framework and a Model Underwater Antiquities Statute*, 15 SAN DIEGO L. REV. 623, 654-660 (1978). *See also* National Historic Preservation Act of 1966, 16 *U.S.C.* §470 (1970), which declares: "The Spirit and direction of the nation is founded upon and reflected in its historic past;...the historical and cultural foundations of the nation should be preserved...in order to give a sense of orientation to the American people; [and] it is...necessary and appropriate for the Federal government to accelerate its historic preservation programs and activities, (and) to give maximum encouragement to agencies and individuals undertaking preservation (as well as) State and local governments."

that protection and preservation of historic landmarks is a proper governmental objective for the exercise of the power of eminent domain. *United States v. Gettysberg Electric R. Co.*, 160 U.S. 668 (1896); *Roe v. Kansas ex rel. Smith*, 278 U.S. 297 (1929). Most recently, the Supreme Court re-articulated this premise in a case involving a city's use of the police power in order to effectuate landmark preservation, stating that "New York City's objective of preserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible governmental goal." *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 129 (1978).

These *amici* submit that under the auspices of Chapter 267 of the Florida statutes, a marine *res* with historical and cultural significance should not be granted any less protection than a historic building or landmark. While recognition of the value and importance in securing our underwater cultural heritage has perhaps been slow in coming, it certainly can be ignored no longer.

> Once on the seabed, or even covered by beach sands, countless wrecks are reasonably well preserved - protected against man, the most destructive agent of all. Sculpture, pottery, weights, tools, glass and weapons are found in wrecks in large numbers in a better state of preservation and usually more precisely dated than on land sites. As early as the first half of the nineteenth century, geologist Charles Lyell could write that "it is probable that a greater number of monuments of the skill and industry of man will in the course of ages be collected together in the bed of the ocean, than will exist at any one time on the surface of the Continents." (citation omitted). Bass, *Marine*

Archaeology: A Misunderstood Science, OCEAN YEARBOOK 2 (1980).

It is unquestioned that a state's police power has been used to preserve and regulate the use of valuable resources necessary for the public welfare. *Skiriotes v. Florida*, 313 U.S. 69 (1941). The Court has also permitted states to regulate traditionally maritime activities so long as these regulations were related to essential state police power interests. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442-43 (1960); *Kelly v. Washington*, 302 U.S. 1, 9-10 (1937). The states have properly recognized that the heritage of this country can be, and in many cases has been, lost without a proper emphasis being placed on locating, acquiring and preserving our historic underwater archaeological sites and properties. The State of Florida, Division of Archives, administers one such program pursuant to the authority contained in the FLA. STAT. §267.011-267.014. The program allows historical information to be obtained, generally through a cooperative effort between the state and private salvage companies, and to be catalogued, preserved and displayed for all generations to enjoy.

This interest of the states is not at odds with federal maritime law, nor should it be considered an intrusion therein. The states have broad interests in many areas which may at times coincide with certain federal interests, and it is clear there need not be found any irreconcilable conflict. The most recent case to address this possible conflict is *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1972). There the Court found state regulation in the area of oil spill prevention to be permissible absent a clear conflict with federal law, and stated:

> To rule as the District Court has done is to allow federal admiralty jurisdiction to swallow most of the police power of the States over oil spillage - an insiduous form of poliution of vast concern to every coastal city or port and to all the estuaries on which the life of the ocean and the lives of the coastal people are greatly dependent. *Id.* at 328-329.

The coastal states' interest in the preservation of their underwater archaeological resources is similarly great.[5] In addition, it naturally follows, in the wake of the United States' failure to convince the Fifth Circuit of its jurisdiction over the *Atocha* in *Treasure Salvors I*, that the State of Florida's dealings with Treasure Salvors was a necessary and proper governmental function.[6]

This governmental function perhaps needs to be placed in proper perspective, in light of the tenor of the opinions below. While the states do not have the pecuniary interest in the gain associated with "treasure-hunting", neither do they seek to stifle the competitive free-enterprise urges of the salvors. The interest of the states is in the preservation of these irreplaceable cultural resources, and in the knowledge of our ancestry to be gained from their location and protection. Refusal to acknowledge the states' very great interest in these archaeological resources will likely mean the loss of any meaningful opportunity to learn of our past from them. This possibility is not one which has failed to stir archaeologists from time to time.

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[5]The authority of states to legislate and contract in areas concerning shipwrecks has previously been addressed in *Ervin v. Massachusetts Co.*, Fla., 95 So.2d 902(1957); *Bruton v. Flying "W" Enterprises*, 273 N.C. 399, 160 S.E. 2d 482 (1968); and *Platoro Ltd., Inc. v. Unidentified Remains of a Vessel*, 508 F.2d 1113 (1975).

[6]See Lawrence, *State Antiquity Laws and Admiralty Salvage: Protecting Our Cultural Resources*, 32 MIAMI L.REV. 291 (1977).

> Treasure hunters very rarely are willing to spend the vast amounts of time and money necessary for proper conservation procedures in order to preserve artefacts recovered from the sea. This would be counterproductive to their goal which is the quick sale of the artefacts in order to gain a monetary profit.
>
> Another danger to the site posed by the treasure hunter is the destruction of the physical interrelationship of the artifacts from which archaeologists and historians can derive interpretations of otherwise unrecorded facts relating to the structure and function of the ship, cargo, passengers, and crew. This information is worth more than the monetary value of the artefacts themselves. Once again the recording of provenience, like conservation, is not something the treasure hunter bothers with since it would slow down and increase the cost of his operation. Arnold, *Some Thoughts on Salvage Law and Historic Preservation,* The International Journal of Nautical Archaeology and Underwater Exploration, 7.3:173-176 (1978).

It is submitted that to allow jurisdiction, in spite of the Eleventh Amendment immunity, to challenge in Federal court the local contractual arrangements made in furtherance of this proper and important governmental concern undermines the fundamental tenets of the amendment.

II.

THE ELEVENTH AMENDMENT EXTENDS TO SUITS IN ADMIRALTY; IN ANY EVENT, ADMIRALTY IN REM NOTIONS SHOULD NOT BE ALLOWED TO OBSCURE THE FACT

THAT AN ATTACK HAS BEEN MADE ON THE STATE'S ABILITY TO RETAIN THESE MATERIALS AND ARTIFACTS OBTAINED PURSUANT TO CONTRACT.

The Eleventh Amendment states that:

> The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State. U.S. CONST. amend. XI.

While the language of the amendment does not expressly concern the ability of a citizen to sue his own state, it has been so construed and may now be considered axiomatic. The early case of *Hans v. Louisiana*, 134 U.S. 1 (1889) stands for the proposition that a suit by a citizen of a state against the state, without its consent, is prohibited by the Eleventh Amendment. Recently, the principle was reiterated in *Edelman v. Jordan*, 415 U.S. 651, 662 (1973), *reh. den.* 416 U.S. 1000 where the court stated:

> While the amendment by its terms does not bar suits against a state by its own citizens, this Court has consistently held that an unconsenting state is immune from suits brought in federal court by her own citizens as well as by citizens of another State.

In addition, while the language of the amendment speaks merely to suits in law and equity, it has been found to be specifically applicable to suits in admiralty. The case of *Ex Parte Madrazzo*, 32 U.S. (7 Pet.) 627 (1883), initially addressed this issue. There the State of Georgia was libelled by one Juan Madrazzo, a subject of the King of Spain. The case is interesting, not merely for its holding, but also for the similarity between its

underlying factual situation and that of the instant case. The libel in *Madrazzo* claimed that the state illegally possessed certain proceeds from the sale of slaves from the vessel *Isabelita*, and the court was requested to award admiralty process against the state to show cause why the proceeds should not be paid over to the libelant. The Court stated definitively that:

> The case is not a case where the property is in custody of a court of admiralty, or brought within its jurisdiction, and in the possession of any private person. It is not, therefore, one for the exercise of that jurisdiction. It is a mere personal suit against a state to recover proceeds in its possession, and in such a case no private person has a right to commence an original suit in this court against a state. Id. at 632.

This principle was reaffirmed in companion cases, *In Re State of New York, No. 1*, 256 U.S. 490 (1921) and *In Re State of New York, No. 2*, 256 U.S. 503 (1921), the latter being known as the *Queen City* case. The first suit involved libels against tugs for damages occurring while the libelants' boats were being navigated by the tugs on the Erie Canal. The tugs were claimed to have been under charter to the superintendent of public works for the State of New York, and motions were served upon him to appear and answer. The Attorney General appeared specially and filed a suggestion that the court was without jurisdiction, as the suit was against the State of New York. The court found that the District Court indeed had no jurisdiction, stating:

> We repeat, the immunity of a state from suit in personam in the admiralty brought by a private person without its consent, is clear. *In Re State of New York, No. 1*, 256 U.S. at 500.

The court further stated that it was not inconsistent to afford states their sovereign immunity in admiralty courts, since this immunity in other tribunals was well established. The *Queen City* case next applied the immunity to an in rem admiralty action involving a libel against the tug, *Queen City*, which was the property of the State of New York. The general principle, then, that the immunity privilege applies in an in rem admiralty action was established.

> The principle so uniformly held to exempt the property of municipal corporations employed for public and governmental purposes from seizure by admiralty process in rem applies with even greater force to exempt public property of a state used and employed for public and governmental purposes. *In Re State of New York No. 2*, 256 U.S. at 511.

This principle is important as an initial proposition, due to the blurring in the courts below of the essential contract issue with issues of admiralty. The Court of Appeals apparently felt its exclusive admiralty in rem jurisdiction must be invoked in order to provide some forum for Treasure Salvors.[7] If, however, the action is in actuality found to be based on in rem admiralty principles, it is clear that the immunity of the State can operate to bar the action.

It is submitted by these *amici* that the continued reference to this matter as an in rem admiralty-type action is misplaced, and has obscured the real focus with which this jurisdictional question should be viewed. The action, at least since the issuance of the

[7]See, e.g. *Treasure Salvors II*, 621 F.2d at 1346, n. 19, where the court stated "[I]f the mere assertion of ownership by a state of a res was sufficient to invoke the Eleventh Amendment, petitioners such as Treasure Salvors would find themselves stranded without a forum in which to litigate their claims."

Warrant for Arrest In Rem, has never been a true in rem - against all the world - cause. The Court of Appeals, in *Treasure Salvors I*, 569 F.2d at 335, stated:

> The United States intervened in plaintiffs' in rem action as a party defendant and filed a counterclaim asserting a property right in the *res*. The government, by intervening in this action and by stipulating to the court's admiralty jurisdiction waived the usual requirement that the *res* be present within the territorial jurisdiction of the court and consented to the court's jurisdiction to determine its interest in the extra-territorial portion of the vessel.

Thus, the jurisdiction in the initial cause was established only by the consent occasioned by the entry into the action by the United States. The interest of the State of Florida was never addressed, and certainly was not foreclosed, by this action. The Court of Appeals expressly noted:

> ...[W]e do not approve that portion of its [the District Court] order which may be construed as holding that plaintiffs have exclusive title to, and the right to immediate possession of, the vessel and cargo as to other claimants, if any there be, who are not parties or privies to this litigation. *Treasure Salvors I*, 569 U.S. at 336.

The true nature of the proceedings is an in personam-type action, directed against the State of Florida. The concern with the vessel *Atocha* need not be considered directly. *Madruga v. Superior Court*, 346 U.S. 556 (1954), concerned a petition by a minority owner of a vessel to prohibit the Superior Court in and for the County of San Diego from entertaining a complaint for partition and sale of the vessel by the majority owners. The Court

looked at the real interests of the parties, and found the cause not to be in rem in the admiralty sense. While there were perhaps some questions of admiralty implied, the court held the quarrel was basically between the co-owners, and that "[e]asily accessible local courts are well equipped to handle these essentially local disputes." *Id.* at 563.[8]

While the matter may be so intimately intertwined with admiralty notions that the Court may choose not to make distinctions with regard to the exact nature of the suit - in rem or in personam- the principles argued in support of the State's immunity are equally applicable regardless of that characterization. The interest of the *amici* in reiterating the limitations on the jurisdictional holding of *Treasure Salvors I*, and in raising the in personam/in rem distinction is to caution against finding some justification for the issuance of the Warrant for Arrest and Show Cause Order in vague in rem admiralty principles.

This cautionary note is particularly appropriate in that the materials and artifacts at issue were not present within the territorial confines of the federal court for the Southern District of Florida, but were housed in Tallahassee, Florida, in the Northern District prior to, and during, this litigation. "To establish *in rem* jurisdiction in admiralty the *res* must be present in the district when the suit is filed or during the pendency of the action." *Platoro Ltd. Inc. v. Unidentified Remains of A Vessel*, 508 F.2d 1113, 1115 (1975).

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[8]See also *Ex parte Madrazzo*, 32 U.S. (7 Pet.) 627, 632 (1833) in which the Court considered the suit to recover proceeds in the possession of the State as a "mere personal suit against a State...."

III.

THE QUEEN CITY CASES SUPPORT A FINDING OF THE ELEVENTH AMENDMENT BAR TO THIS ACTION; THE "SPECIAL CHALLENGE" LANGUAGE THEREIN DOES NOT ALLOW THE FEDERAL COURT TO DETERMINE THE VALIDITY OF THE CONTRACTS UNDER WHICH THE STATE CLAIMS.

Much has been argued below in an effort to distinguish the clear holding of *Queen City;* in particular much time has been devoted to construction of the following language found therein:

> We deem it clear, however, that the verified suggestion presented by the Attorney General of that State, in his official capacity as representative of the State and the People thereof, amounts to an official certificate concerning a public matter presumably within his official knowledge, and that it ought to be accepted as sufficient evidence of the fact [of ownership], at least in the absence of a special challenge. *In Re State of New York, No. 2,* 256 U.S. at 509.

The lower court construed this language as a limitation of the *Queen City* ruling, such that the Eleventh Amendment would not bar the action when the claim of state ownership was *controverted* by the opposing party.

> The *Queen City* tells us that when a state submits uncontroverted evidence of ownership in an admiralty in rem action, the district court is bound to accept the assertion and apply the Eleventh Amendment accordingly. In the case at bar, however, we have a *controverted* claim of ownership.

> Treasure Salvors offered evidence and legal argument to show that it, and not Florida, owned the artifacts from the *Atocha*. Such an offer is the "special challenge" that the Supreme Court envisioned in the *Queen City*. *Treasure Salvors II*, 621 F.2d at 1345.

These *amici* submit that this is a clearly unwarranted construction of the "special challenge" language, and that is needlessly and recklessly opens the door to the virtually unassailable "jurisdiction to determine jurisdiction" arguments upon which the hopes of the respondents' are pinned. See *United States v. United Mine Workers of America*, 330 U.S. 258, (1947) and *Nestor v. Hershey*, 425 F.2d 504 (1969). However, such arguments are wholly outside the true issues in this cause, and if followed would lead inescapably to the result envisioned by Judge Rubin in his dissent below:

> In essence the suggestion by my brethren that the court can determine whether it has jurisdiction of a suit over state-claimed property by looking to the merits is equivalent to asserting that suits against a state are permitted by the Eleventh Amendment if the result is that the state loses.*Treasure Salvors II*, 621 F.2d at 1351.

A careful reading of the factual context in which the "special challenge" language of *Queen City* appeared reveals that the court was not thereby setting up an adjudication of that claim, as occurred below, but was merely determining whether the State was the real party in interest. The record of proceedings itself did *not*, in *Queen City*, reveal anything about the ownership of the vessel or its employment by the State other than the suggestion of the Attorney General. The issue arose upon the verified suggestion, and the Court merely

concluded that, inasmuch as there had been no "special challenge" to the suggestion, it should have been accepted.

> It would be an unwarranted aspersion upon the honor of a great state to treat facts thus solemnly certified by its chief law officer, and accepted as true when passed upon by the District Court, as now requiring verification. *In Re State of New York No. 2*, 256 U.S. at 509.

It is thus submitted that the Court was speaking in terms of what might be an accepted practice and procedure, and not definitively carving out an Eleventh Amendment exception for *controverted* state ownership.[9]

Further, the court below, even following its *controverted* claim line of reasoning, went far beyond what was necessary to determine the threshhold Eleventh Amendment issue. The question raised at every turn by the State of Florida's Motion to Quash Warrant for Arrest In Rem, its Reply to Rule to Show Cause, and its Petition for Prohibition and for Stay is not the *validity* of the contracts under which it received the property in question, but rather the *existence* of its title pursuant to the contracts prior to any lawsuits pertaining to ownership of the vessel. The underlying dispute over the construction of the contracts is purely and simply a local question, quite separate from any admiralty considerations. Assuming *arguendo* that the "special challenge" language has the connotation placed upon it by the Court of Appeals, can it be

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[9]This notion is further supported by the care taken by *Queen City* to distinguish *In Re Muir*, 254 U.S. 522 (1921), which had involved a suggestion of British ownership of the vessel *Gleneden* which "...came not through official channels, but from private counsel...." *In Re State of New York No. 2*, 256 U.S. at 510.

seriously contended that this enables the Court to reach the very merits of the issue — the *validity* of the contracts? These *amici* believe such a construction would seriously undermine the basic premise of the Eleventh Amendment. "A state's freedom from litigation was established as a constitutional right through the Eleventh Amendment. The inherent nature of sovereignty prevents actions against a state by its own citizens without its consent." *Great Northern Ins. Co. v. Read*, 322 U.S. 47, 51 (1944). While the existence of various consent, and waiver, theories may be considered by some to have eroded the vitality of the Eleventh Amendment's immunity,[10] these principles do not constitute such a direct assault as this case on the state's freedom from interference of the federal judiciary in matters of such purely local concern as contracts with its own citizens.

IV.

THE SUIT IS ONE AGAINST THE STATE, AND THE "JURISDICTION TO DETERMINE JURISDICTION" ARGUMENT ADVANCED BY THE RESPONDENTS DOES NOT ALLOW THE COURT TO REACH THE MERITS OF THE CASE ONCE THIS IS ESTABLISHED.

The *amici* contend the Court of Appeals' ruling, that this does not present a suit against the state, given in such a cavalier, almost "off-hand" manner, also portends an erosion of the Eleventh Amendment immunity which is simply not warranted. It is clear that the real party in interest here is the State of Florida. There has been, throughout the proceedings below, no

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[10]See Thornton, *The Eleventh Amendment: An Engandered Species*, 55 IND. L.J. 293 (1977).

indication that the suit could be couched as anything other than one against the State.

Almost from the very beginnings of the construction of the Eleventh Amendment, various escapes from its prohibition to suit have been considered. One such route has been to name individual officers of the state and prosecute the action against them. The court has examined these devices in detail and has indicated that:

> The general rule is that a suit is against the sovereign if 'the judgment sought would be to restrain the government from acting, or to compel it to act.' (citations omitted) *Dugan v. Rank*, 372 U.S. 609, 620 (1963).

These *amici* support, in particular, the argument of the State of Florida, that this is indeed a suit against the sovereign. Not only has it involved throughout as the party of record, the State of Florida, the Department of State and its Division of Archives, it is clear that the contract and property rights of the State, and not any individual, are at issue. The line of cases, beginning with *Pennoyer v. McConnaughy*, 140 U.S. 1 (1890) and expanded upon, and crystallized, by *Ex Parte Young*, 209 U.S. 123 (1908), generally to the effect that immunity is unavailable to officers of the state seeking to enforce an unconstitutional act, are inapposite since there is no suggestion of improper action taken pursuant to some unconstitutional authority. It is not to be argued that, if such were the case, the court would be powerless to entertain the action.

> The other class [of Eleventh Amendment action] is where a suit is brought against defendants who, claiming to act as officers of the State and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the

> plaintiff .... Such suit ... is not ... an action against the State. (all citations omitted) *Pennoyer v. McConnaughy,* 140 U.S. at 10.

It is submitted that the principles expressed in the watershed case, *Larson v. Domestic and Foreign Corp.,* 337 U.S. 683 (1949) are controllng, and that the "jurisdiction to determine jurisdiction" argument advanced below should be repelled. In *Larson,* the War Assets Administrator had been sued to enjoin the sale of surplus coal which allegedly had been previously sold to the plaintiff. The Court carefully, and purposely, avoided the underlying contract-construction issue, and found the district court had no jurisdiction over the unconsenting sovereign. The case is instructive in that there were no claims of unconstitutional actions by the officer involved, but merely a "cause of action" claim of an illegal possession of the coal. Similarly, the Division of Archives in the instant case has been claimed by the respondents to be in illegal and improper possession of the *Atocha* artifacts, even though its interest therein has been at all times pursuant to legislative authority and validly-executed contracts. *Larson* disposes of the argument that the allegation of "illegal" action is enough to overcome the Eleventh Amendment by stating:

> ...the actions of an officer of the sovereign (be it holding, taking or otherwise legally affecting the plaintiff's property) can be regarded as so "illegal" as to permit a suit for specific relief against the officer as an individual only if it is not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are unconstitutionally void. *Id.* at 701-702.

The Court of Appeals should not have looked to the underlying contract in order to bootstrap the matter

into its jurisdiction. The obvious result of such a maneuver was correctly pointed out by Judge Rubin, and these *amici* urge that this approach be nullified. As in the *Larson* line of cases[11], the ultimate question on the merits may be assumed for purposes of decision to go against the sovereign, but in the absence of some claim of unconstitutional action, the suit must be dismissed as one against the sovereign without its consent.

The real effect of this suit is not to adjudicate statutory authority or even the alleged unconstitutional actions of an officer of the state, but to compel the state to appear in federal court in order to retain possession of its own property, obtained through a contractual arrangement with one of its own citizens. It is simply a question-begging device to declare or imply that such would not be a suit directed against the sovereign.

V.

THE STATE OF FLORIDA HAS NOT WAIVED ITS IMMUNITY; IN PARTICULAR, ITS INTEREST IN HISTORIC PRESERVATION AND UNDERWATER ARCHAEOLOGICAL ARTIFACTS IS NOT A *PARDEN*-LIKE ENTRY INTO FEDERAL MARITIME ACTIVITY.

While the Court of Appeals' decision ignored aspects of the consent/waiver doctrines which are so important to Eleventh Amendment considerations, the District Court raised several interesting points with regard to the state's consent to the suit which should be addressed.

The Eleventh Amendment privilege of immunity can scarcely be mentioned without noting that it involves notions that the sovereign state cannot be sued without

[11]See also *Goldberg v. Daniels*, 231 U.S. 218 (1913) and *Malone v. Bowdoin*, 369 U.S. 643 (1962).

its consent, and that the privilege may be waived. *See Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1858). One such method of waiver is by voluntary appearance in an action to present a claim.

In *Gardner v. State of New Jersey*, 329 U.S. 565, 67 S. Ct. 467 (1947), cited by the District Court, *Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel*, 459 F. Supp. 507 (S.D. Fla. 1978), the Court noted that the state had waived its immunity with respect to certain claims involving a debtor railroad by becoming the actor and filing a claim in bankruptcy. The fallacy of applying this principle in the case *sub judice* is readily apparent, as the State of Florida has never voluntarily become an "actor" seeking to establish rights in the property at issue. It has rather been subjected to the federal court-issued warrant for arrest for property in its possession pursuant to contract.

Neither can it be said that the state has waived its Eleventh Amendment privilege by its appearance in this suit, even to answer a claim on the merits. In *Ford Motor Company v. Dept. of Treasury*, 323 U.S. 459 (1945), the Court addressed the situation in which the Attorney Geneal appeared, represented the State, and defended the action on its merits. The Eleventh Amendment claim was not even raised until the action reached the Supreme Court, but the Court nevertheless undertook to determine whether any executive or administrative officer of the State had been authorized to waive the state's immunity. The Court stated that such authorization "...is not to be presumed in the absence of clear language to the contrary...", *Id.* at 468, and found no waiver. Similarly here, no waiver authority has been found, and the appearance by the State below has not operated to overcome the Eleventh Amendment privilege.

A state may also waive its immunity, and consent to suit by legislative or constitutional pronouncements. However, the waiver must not only be express and unequivocal, it will not generally be found to authorize suits against the state in courts other than its own. See *Murray v. Wilson Distilling Company*, 213 U.S. 151, 171 (1909); *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47 (1944); *Ford Motor Company v. Dept. of Treasury*, 323 U.S. 459 (1945). These *amici* expressly support the position of the State of Florida to the effect that neither the Florida Constitution, FLA. CONST., Art, 10, §13, nor its statutes, can be construed to be an express and unequivocal waiver of immunity in this type of action.

The most recent applications of the waiver doctrine have involved the entrance of the state into areas of federally-regulated activities. The triumvirate of cases, beginning with *Parden v. Terminal R. of Alabama State Docks Department*, 377 U.S. 184 (1964), *reh. den.* 377 U.S. 1010, as further refined by *Employees of Dept. of Public Health & Welfare v. Dept. of Public Health & Welfare*, 411 U.S. 279 (1973) and by *Edelman v. Jordan*, 415 U.S. 651 (1973), have resulted in the unavailability of the privilege when (1) as a threshhold matter, Congress has expressly indicated that suits against the state are possible under an applicable federal law, and (2) the state voluntarily participates in the activity governed by the law. These principles are not involved in this matter, except in the most peripheral sense. It is apparent that this case does not present the opportunity for application, or extension, of the waiver doctrine as amplified by *Parden*, *Employees* and *Edelman*, but the cases are instructive to remind one of the scope and breadth of the Eleventh Amendment, and to reiterate the underlying principle that waiver is not lightly to be inferred, as was done so by the courts below. As the

Court stated in *Edelman*, citing *Murray v. Wilson Distilling Company*, 213 U.S. 151 (1909):

> In deciding whether a state has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as would leave no room for any other reasonable construction.' *Edelman v. Jordan*, 415 U.S. at 673.

The district court's argument, in *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 459 F. Supp. at 529, that a *Parden*-like waiver is present due to the engagement of the State of Florida in a "salvage operation" constitutes a convoluted interpretation of the waiver doctrine, and should not be further advanced. The interest of the state in the area of preservation of its historic artifacts need not be considered as an entry into some vague field of federal maritime activity. (See Argument I, *supra.*) Although the Court of Appeals failed to address consent or waiver in its decision, it is apparent that concluding the State of Florida has made a *Parden*-like entry into a federally regulated area is erroneous and that such a theory cannot operate to confer jurisdiction on the Court.[12]

There simply is no consent, or waiver, to be found in the actions of the State of Florida in this matter. Absent such a consent, the suit against the state must be dismissed. To allow the respondents to call the state into

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[12] In *Intracoastal Transportation, Inc. v. Decatur County Georgia*, 482 F.2d 361 (1973), a case in which entry into a federally regulated sphere of activity was presented explicitly, and in which admiralty jurisdiction was at issue, the Fifth Circuit did not find any implied consent. Of similar import is *Williamson Towing Co., Inc. v. State of Illinois*, 534 F.2d 758 (1976).

federal court and have the legality of its possession of these historical artifacts adjudged is simply and clearly not in accordance with the traditional protection afforded by the Eleventh Amendment. Stripped of its implied in rem admiralty notions, the matter may be viewed as a very direct intrusion on the basic principle of immunity from suit in federal court.

CONCLUSION

For the reasons stated above, *amici* urge this Court to find that the Eleventh Amendment bars this action against the State of Florida, and to reverse the decision of the Fifth Circuit Court of Appeals.

Respectfully submitted this the 31st day of July, 1981.

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CERTIFICATE OF SERVICE

I hereby certify that on this the 1st day of August, 1981, three (3) copies of BRIEF FOR THE STATES OF ALABAMA, ... IN SUPPORT OF THE PETITIONER, AMICI CURIAE, were mailed, by depositing same in the United States Post Office, with first class postage prepaid, to counsel of record at the following addresses:

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